Petition

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81-1736
No.

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HARRIS SHARPE AND DONALD DAVIS SAVAGE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ELLIOTT SCHULDER
Assistant to the Solicitor General

JOHN F. DEPUE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether law enforcement officers may detain an individual reasonably suspected of criminal activity for a limited but more than momentary period, in order to pursue their investigation of suspected criminal activity.

2. Whether, assuming that respondents were unlawfully detained in violation of the Fourth Amendment, a large quantity of marijuana seized from respondent Savage's vehicle is a suppressible fruit of either respondent's detention.

3. Whether the Fourth Amendment requires police to obtain a warrant prior to searching large burlap-wrapped bales that emit the distinctive odor of marijuana.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-38a) is reported at 660 F.2d 967.

JURISDICTION

The judgments of the court of appeals (App. E, *infra*, 45a-46a) were entered on September 4, 1981. A petition for rehearing with a suggestion for rehearing en banc was denied by an equally divided court on December 18, 1981 (App. B, *infra*, 39a-

40a). On February 4, 1982, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including March 18, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of South Carolina, respondents were convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Respondent Savage was sentenced to eight years' imprisonment, to be followed by a ten-year special parole term. Respondent Sharpe was sentenced to five years' imprisonment to be followed by a ten-year special parole term. A divided panel of the court of appeals reversed respondents' convictions.

1. Prior to trial, respondents moved to suppress a large quantity of marijuana seized from a pickup truck that had been operated by respondent Savage. The evidence showed that on the morning of June 9, 1978, DEA Agent Luther Cooke was on patrol in an unmarked car on a coastal road in the vicinity of Sunset Beach, North Carolina, an area under surveillance by law enforcement authorities for suspected drug trafficking (I Tr. 35-36).[1] At approximately 6:30 a.m., Cooke observed a blue pickup truck with an attached camper shell travelling in tandem with a blue Pontiac. It was later ascertained that the pickup truck was operated by respondent Savage and the Pontiac, which contained a male passenger, was operated by respondent Sharpe. Cooke noticed

[1] "Tr." refers to the transcript of respondents' bench trial, during which the suppression hearing was conducted (see App. A, *infra*, 1a-2a).

that the pickup truck was riding low in the rear and appeared overloaded; in addition, the rear window of the camper appeared to be covered by a quilted material (I Tr. 39-41). The agent also observed that when the truck hit a bump or turned a corner it did not bounce or sway, a further indication that it was carrying a heavy load. Cooke followed the two vehicles for approximately 21 miles. When the procession reached the vicinity of Myrtle Beach, South Carolina, Agent Cooke decided to make an investigative stop of both the pickup truck and the Pontiac, and he radioed the State Highway Patrol for assistance in stopping the vehicles (I Tr. 44-46).

Officer Kenneth Thrasher, in a marked patrol car, responded to Cooke's request for assistance. After Thrasher caught up with Cooke, the two officers, in their separate vehicles, followed respondents as the Pontiac and pickup truck turned onto a side road that ran through a campground and looped back to the highway. Although the speed limit on the road was 35 miles per hour, respondents drove their vehicles at 50 to 60 miles per hour in an apparent effort to elude the officers (I Tr. 50-52, 142-144; App. A, *infra*, 2a-3a, 16a-17a). The Pontiac and truck then returned to the six-lane highway and continued to proceed in a southerly direction in the center lane. While the officers maintained their pursuit, Cooke asked Officer Thrasher to signal both vehicles to stop. Thrasher pulled into the left lane alongside the Pontiac, which was the lead vehicle, and signaled the driver, respondent Sharpe, to pull over. As Sharpe moved his car into the right lane in compliance with this direction, the pickup truck, driven by respondent Savage, cut between the Pontiac and Thrasher's patrol car, almost hitting the patrol car,

and continued down the highway (I Tr. 53-54, 144-145).

While Thrasher pursued the pickup, Cooke pulled up behind the Pontiac, approached its occupants, and requested identification from respondent Sharpe and his companion. Sharpe produced a Georgia driver's license bearing the name Raymond J. Pavlovich (I Tr. 54). Cooke then attempted for several minutes to radio Thrasher to determine whether he had succeeded in stopping the pickup, but he was unable to reach him, apparently because Thrasher was not in his patrol car. Approximately 10 to 15 minutes after the initial stop of the Pontiac, two Myrtle Beach policemen arrived at the scene to remain with Sharpe and his companion while Cooke left to locate Officer Thrasher and the pickup (I Tr. 54-57, 100-101).

Meanwhile, Thrasher succeeded in stopping respondent Savage's pickup truck approximately a half-mile down the highway. As Thrasher got out of his patrol car with his revolver drawn, Savage stepped out of the truck. After searching Savage, Thrasher holstered his weapon and requested Savage to produce his driver's license and vehicle registration. Savage produced a Florida driver's license in his own name and a bill of sale in the name of Pavlovich. Noting that the truck bore South Carolina license plates, that the bill of sale bore a Georgia address and that Savage's license was from Florida, Thrasher questioned Savage about the ownership of the truck. In response to the officer's questions, Savage stated that the vehicle belonged to a friend, that it was empty, and that he was taking it to get the shock absorbers fixed. He also denied speeding on the campground road and stated that Thrasher was not behind him when he drove through the area. When Thrasher told Savage that Cooke was a DEA agent

and would be arriving shortly, Savage became nervous, requested Thrasher to return his driver's license and asked permission to leave. Thrasher responded that Savage was not free to leave, that he would be detained until Cooke's arrival, and that he could be held on speeding charges if necessary (I Tr. 146-150, 163-165).

When Agent Cooke arrived approximately 20 minutes after the truck had been stopped, he identified himself, examined the bill of sale Savage had produced, and noticed that the name on it matched the name on the driver's license that Sharpe had produced. Cooke told Savage that he suspected that the pickup contained marijuana. He requested permission to search the truck, but Savage declined, explaining that he was not the owner of the vehicle (I Tr. 61, 103-105). Cooke then stepped onto the rear bumper and noted that the truck did not move, confirming his suspicion that the truck was heavily loaded. Cooke then leaned against the rear window of the camper, took a deep breath, and "smelled a very strong and distinct odor of marijuana" (I Tr. 62, 151). Using keys that he removed from the vehicle's ignition, Agent Cooke opened the rear door of the camper and observed a large number of burlap-wrapped bags, which he described as "similar to the large number of bales of marijuana [he had] encountered over the * * * years" he had been employed as a DEA agent (I Tr. 62-63, 151-152).

Cooke then placed Savage under arrest and left him in Officer Thrasher's custody while he returned to the Pontiac to arrest Sharpe and his companion (I Tr. 63, 119).[2] In all, 30 to 40 minutes elapsed

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[2] The charges against Sharpe's companion were ultimately dismissed (App. A, *infra*, 3a). After Cooke left the location at which the pickup truck had been stopped, Savage at-

between the initial stop of the Pontiac and the arrests of both respondents following the discovery of the marijuana bales in the pickup (I Tr. 120; App. A, *infra*, 4a).

Later that day, the pickup truck was taken to the Federal Building in Charleston, South Carolina. Two or three days later, DEA agents, acting under Cooke's supervision, removed from the truck 43 bales weighing a total of 2,600 pounds. Each bale consisted of a highly compressed batch of marijuana wrapped in paper bags inside a taped plastic bag that was covered by burlap tied with twine. Acting without a search warrant, the agents selected eight bales at random, punctured their coverings, and withdrew core samples for laboratory analysis (I Tr. 65-68). The analysis proved that the substance was, indeed, marijuana. On the basis of this evidence, the district court denied respondents' motions to suppress (I Tr. 221-222; II Tr. 151-154).

2. A divided court of appeals reversed respondents' convictions (App. A, *infra*, 1a-38a). The majority assumed that Agent Cooke "had an articulable and reasonable suspicion that [respondents] were engaged in marijuana trafficking when he and Thrasher stopped the Pontiac and the truck" (*id.* at 6a), but held that the investigative stops of respondents were unlawful because the stops "failed to meet the requirement of brevity" (*ibid.*). Relying on this Court's decisions in *Dunaway* v. *New York*, 442 U.S. 200 (1979), *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), and *Terry* v. *Ohio*, 392 U.S. 1

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tempted to bribe Thrasher, stating that if Thrasher would remove Savage's handcuffs and permit him to escape, "the owner of the truck would send [Thrasher] thirty thousand dollars" (Tr. 154).

(1968), the majority viewed the time element as dispositive in distinguishing between a permissible investigative stop and an unlawful detention (App. A, *infra*, 6a-7a). Noting that "Sharpe was detained * * * for thirty to forty minutes before Cooke returned to the Pontiac to arrest him, and [that] Savage was held * * * by Thrasher for at least fifteen minutes before being questioned and finally arrested by Cooke," the majority concluded that "the length of the detentions effectively transformed them into de facto arrests without bases in probable cause" and that the detentions therefore constituted unlawful seizures under the Fourth Amendment (*id.* at 7a). Proceeding from this determination, the majority reasoned that the marijuana discovered in the pickup truck was the fruit of the unlawful detentions because Agent Cooke would not have had the opportunity to detect its presence "had Savage not been detained for longer than constitutionally permissible under an investigatory stop" (*id.* at 9a). Accordingly, the majority held that the marijuana should have been suppressed (*ibid.*).

As an alternative basis for suppressing the evidence, the majority held that the DEA agents' warrantless search of the burlap-wrapped marijuana bales violated the Fourth Amendment (App. A, *infra*, 10a-12a). The majority noted that a plurality of this Court had concluded in *Robbins* v. *California*, No. 80-148 (July 1, 1981), that "all closed containers manifest an individual's reasonable expectation of privacy in their contents, unless a container by its very appearance betrays an illegal purpose or its contents are exposed to plain view" (App. A, *infra*, 11a). Under this reasoning, the majority found that the "appearance [of the well-packaged marijuana

bales] did not manifest their contents" (*id.* at 12a),[3] and, accordingly, it ruled that the agents should have obtained a warrant before removing samples from the bales. Addressing the analysis employed by Justice Powell in his concurring opinion in *Robbins*, the majority also determined that respondents "had a reasonable expectation of privacy in the bales, as evidenced by the careful packaging and sealing of the bales and the placing of them inside the curtained camper" (App. A, *infra*, 12a).

Judge Russell dissented (App. A, *infra*, 13a-38a). He disagreed with the majority's initial holding that the reasonableness of an investigative detention on less than probable cause is invariably determined by its duration. In his view, the Fourth Amendment does not support a mechanical rule that a more than momentary investigatory stop is per se unreasonable; rather, in determining whether the length of detention renders a particular stop unreasonable, he concluded that the courts must look to the totality of the circumstances justifying the detention (*id.* at 14a-16a). Applying this test, Judge Russell observed that any delay that prolonged respondents' detention was not attributable to the law enforcement officers but was occasioned by respondent Savage's deliberate actions to avoid being stopped together with respondent Sharpe. Because it was reasonable to detain both respondents for questioning by DEA Agent Cooke concerning their suspected joint drug trafficking activities, Judge Russell concluded that the detention of respondents did not violate the Fourth Amendment (*id.* at 16a-25a).

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[3] The majority observed that according to respondents' evidence the marijuana bales were virtually identical in appearance to "bales of tobacco, cotton goods, and hemp" (App. A, *infra*, 12a n.4).

Turning to the warrantless search of the burlap-wrapped marijuana bales, Judge Russell noted that the plurality opinion in *Robbins* and this Court's decision in *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), both make clear that a search warrant is not required when a container, by its nature, reveals its contents or otherwise exposes them to plain view (App. A, *infra*, 29a). The distinctive odor emitted by the 2,600 pounds of marijuana, he reasoned, "was sufficient to place the contents of the bales in 'plain view' " (*id.* at 31a) and obviated any requirement to obtain a warrant before opening the bales to inspect their contents (*id.* at 37a).[4]

REASONS FOR GRANTING THE PETITION

This case presents two separate sets of important Fourth Amendment questions warranting review by this Court. The first group of issues arises from the court of appeals' holding that the marijuana seized from the pickup truck should have been suppressed as the product of an unlawful detention of respondents. The conclusion of the court below that a more than momentary investigative stop is per se unreasonable under the Fourth Amendment unless supported by probable cause to arrest is at odds with this Court's recent decision in *Michigan* v. *Summers*,

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[4] Judge Russell also observed that "*Robbins* indicates that containers are protected [from warrantless searches] unless they are inevitably not associated with an expectation of privacy" (App. A, *infra*, 30a). Assuming, as did the majority (see note 3, *supra*), that the bales might also have contained tobacco, cotton, hemp, or other agricultural commodities instead of marijuana, he reasoned that, at all events, it was clear that they did not contain personal items and thus they were not protected from warrantless searches under a Fourth Amendment privacy theory (*id.* at 30a-31a).

No. 79-1794 (June 22, 1981), and is inconsistent with the decisions of several other courts of appeals. Moreover, the conclusion that the marijuana discovered in the pickup truck was the fruit of the prolonged detention of respondents is contrary to established principles of Fourth Amendment law.

The second set of issues stems from the court of appeals' alternative holding that the marijuana was subject to suppression because the warrantless removal of samples from the bales of marijuana violated the Fourth Amendment. This holding presents a question similar to that before the Court in *United States* v. *Ross*, No. 80-2209 (argued March 1, 1982), which concerns the constitutionality of a warrantless search of a paper bag found during a lawful search of an automobile. Because of the similarity of the warrantless search issue in this case to that in *Ross*, the validity of the agents' search of the marijuana bales in this case may be governed by the decision in *Ross*. Even an affirmance of the court of appeals' holding that a warrant was required in *Ross*, however, would not establish that the instant decision is correct.

1. The question whether the police may, on the basis of reasonable suspicion not amounting to probable cause, detain a person for a limited but more than momentary period where necessary to advance their investigation is a matter of substantial importance to federal and state law enforcement authorities. If allowed to stand, the holding of the court below that, absent probable cause, investigatory stops that are more than momentary are per se unreasonable under the Fourth Amendment, without regard to the facts or circumstances that necessitate the detention, will seriously impede legitimate investiga-

tive activities by law enforcement officers. The decision below is fundamentally at odds with the decision in *Michigan* v. *Summers*, *supra*, and is inconsistent with decisions of other courts of appeals that have addressed the issue.

In *Summers*, this Court held that it was lawful for the police to detain the occupants of a house on less than probable cause while executing a warrant authorizing a search of the premises for contraband. In reaching this result, the Court recognized (slip op. 6-8) that under some circumstances specific law enforcement interests permit investigative detentions of greater duration than the momentary, on-the-street stops involved in *Terry* v. *Ohio*, *supra*, and *Adams* v. *Williams*, 407 U.S. 143 (1972). The Court reiterated that the ultimate standard of the Fourth Amendment is reasonableness (slip op. 7-8), and it specifically noted (slip op. 8 n.12) that

> [i]f the purpose underlying a *Terry* stop—investigating possible criminal activity—is to be served, the police must under certain circumstances be able to detain the individual for longer than the brief time period involved in *Terry* and *Adams*.

The Court then quoted with approval Professor La Fave's recitation of examples of investigative techniques that may justifiably be carried out under the rubric of an investigative detention based upon founded suspicion:

> "It is clear that there are several investigative techniques which may be utilized effectively in the course of a *Terry*-type stop. The most common is interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained. Sometimes the officer will communicate with

> others, either police or private citizens, in an effort to verify the explanation tendered or to confirm the identification or determine whether a person of that identity is otherwise wanted. Or, the suspect may be detained while it is determined if in fact an offense has occurred in the area, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect, or talking with other people. If it is known that an offense has occurred in the area, the suspect may be viewed by witnesses to the crime. There is no reason to conclude that any investigative methods of the type just listed are inherently objectionable; they might cast doubt upon the reasonableness of the detention, however, if their use makes the period of detention unduly long or involves moving the suspect to another locale."

Michigan v. *Summers*, *supra*, slip op. 8-9 n.12, quoting 3 W. LaFave, *Search and Seizure* § 9.2, at 36-37 (1978). Professor LaFave's summary of the governing principles concludes that the permissibility of extending a *Terry* stop should turn on "[w]hether the police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon and whether it is rather essential to the investigation that the suspect's presence be continued during that interval." *Id.* at 40. See *Michigan* v. *Summers*, *supra*, slip op. 10 n.14. Thus, while *Summers* itself involved the detention of a suspect in the course of conducting a warrant-authorized search of his premises, the Court's analysis clearly demonstrates that a law enforcement officer making a valid on-the-street *Terry* stop may also lawfully detain the suspect for more than a brief moment if such action is reasonably re-

quired in order to pursue a legitimate avenue of investigation.[5]

The courts of appeals have upheld the detention of a suspect beyond a momentary stop in a number of different settings, where the justification for extending the detention outweighed the intrusion on the citizen's privacy. For example, in *United States* v. *Short*, 570 F.2d 1051, 1054-1055 (D.C. Cir. 1978), the court held that it was permissible for the police

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[5] We note that *Florida* v. *Royer*, cert. granted, No. 80-2146 (Nov. 30, 1981), presents the question whether, in the particular circumstances of that case, the respondent had been subjected to a seizure requiring probable cause when he accompanied narcotics officers from an airline terminal concourse to a nearby office, where he consented to a search of his luggage. In holding that the respondent had been arrested at the time he consented to the search, the Florida District Court of Appeal focused on a number of factors, including the fact that the respondent was placed in confined quarters with two policemen, that he had been told of the officers' suspicions, that his airplane ticket and luggage had been taken from him, and that the State had conceded that the respondent would not have been allowed to leave the police office. In our amicus brief in *Royer* (a copy of which we are sending to respondents), we argue that these factors, which indicate at most that Royer's freedom of movement was restrained, merely establish that Royer may have been subjected to a Fourth Amendment seizure, not that the seizure was so intrusive as to amount to an arrest. In this case, the court of appeals correctly recognized that the initial seizure of respondents was not the equivalent of an arrest, but it erred in holding that the temporal extension of that seizure beyond a momentary stop, regardless of its purpose and justification, converted the permissible stop into an arrest that had to be justified by probable cause. Because the detention issue in *Royer* does not turn on duration but on other factors, the outcome of *Royer* will in all likelihood not be dispositive of the instant case.

to detain a burglary suspect, whom they lacked probable cause to arrest, for the purpose of transporting the suspect to the scene of the burglary for possible identification by the victim. Accord, *United States* v. *Wylie*, 569 F.2d 62, 70-71 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978). Similarly, in *United States* v. *Viegas*, 639 F.2d 42, 44-45 (1st Cir.), cert. denied, 451 U.S. 970 (1981), the court upheld the actions of DEA agents in detaining an airplane passenger and his baggage, which they suspected of containing drugs, to permit its exposure to a drug detection dog. But cf. *United States* v. *Martell*, 654 F.2d 1356, 1359 (9th Cir. 1981) (suggesting that 20 minute detention of defendants with their luggage in order to procure a detector dog constituted an unlawful detention).[6] And in *United States* v. *O'Looney*, 544 F.2d 385, 389 (9th Cir.), cert. denied, 429 U.S. 1023 (1976), the court concluded that the Fourth Amendment permitted the police to detain a person suspected of smuggling firearms for the period necessary to obtain the presence of a law enforcement officer with specific expertise in conducting investigations of such offenses. Accord, *United States* v. *Moore*, 638 F.2d 1171, 1174 (9th Cir. 1980), cert. denied, 449 U.S. 1113 (1981) (approving investigative detentions necessary to obtain presence of police officers with special expertise; collecting cases).[7] The

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[6] We note that the separate question whether luggage may be detained on reasonable suspicion is presented in our petition for a writ of certiorari in *United States* v. *Place*, No. 81-1617 (filed Mar. 1, 1982).

[7] See also *United States* v. *Richards*, 500 F.2d 1025, 1029 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975) (approving detention of two persons suspected of drug smuggling for more than an hour while DEA agents checked with the Federal Aviation Administration to determine whether the air-

holding of the court of appeals, unless overturned, would virtually preclude law enforcement officers who have made a valid *Terry* stop from maintaining the status quo long enough to resort to reasonable investigative measures that are likely either to establish probable cause to arrest or to dispel the suspicion.

Moreover, the court of appeals' mechanistic application of a rigid temporal standard, totally divorced from other pertinent considerations, is inconsistent with the Fourth Amendment's core philosophy. As this Court has emphasized, the Fourth Amendment requires an assessment of " 'the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security.' " *Michigan* v. *Summers*, *supra*, slip op. 8 n.11, quoting from *Terry* v. *Ohio*, *supra*, 392 U.S. at 19. See also, *e.g.*, *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981); *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979).

Here the totality of the circumstances demonstrates the reasonableness of respondents' detention. To begin with, at the time he requested Officer Thrasher to signal respondents' vehicles to stop, Agent Cooke had a reasonable suspicion that respondents were engaged in illegal activity. Cooke observed the vehicles as they travelled in tandem for 21 miles

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craft in which the suspects were about to depart was stolen); *United States* v. *Mayes*, 524 F.2d 803, 805-808 (9th Cir. 1975) (upholding detention of suspected drug smuggler for an hour and a half while Border Patrol agents attempted to verify or disprove suspect's exculpatory explanation concerning his activities); *United States* v. *Contreras-Diaz*, 575 F.2d 740, 745 (9th Cir.), cert. denied, 439 U.S. 855 (1978) (inability of suspected illegal aliens to furnish valid identification justified their prolonged detention to permit a check with the border patrol).

in an area near the coast frequented by drug traffickers. In addition, the pickup truck appeared to be heavily loaded and the windows of the camper were covered. Finally, respondents' vehicles took evasive actions and began speeding after Thrasher, in his marked police car, joined Agent Cooke in following respondents. Based on these facts, Cooke acted properly in attempting to stop respondents' vehicles for the limited purpose of questioning respondents about their activities and ascertaining whether the pickup was loaded with drugs.[8]

Similarly, it is clear that the 30 to 40 minute delay between the initial stopping of respondents and their ultimate arrests was fully justified under the circumstances. As Judge Russell observed in his dissent below (App. A, *infra*, 17a-19a, 24a-25a), the delay was no fault of the officers but is almost entirely attributable to the evasive action taken by respondent Savage that resulted in respondents' being stopped a half-mile apart by different law enforcement officers. The fact that respondents were stopped at separate locations made it impossible for Cooke, the only DEA agent on the scene, to inspect the pickup truck, which was the focus of his suspicion, and to question its driver, respondent Savage, until police reinforcements arrived to maintain the status quo with respect to respondent Sharpe. Cooke's unsuccessful efforts to contact Officer Thrasher by radio, his wait for reinforcements, and his trip from

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[8] Indeed, the majority below assumed that the initial stops of respondents were justified by reasonable suspicion (App. A, *infra*, 6a). We note in addition that Officer Thrasher apparently had probable cause to arrest both respondents for speeding. Thus, there can be no question as to the propriety of the stop of either respondent.

Sharpe's Pontiac to the pickup, all necessitated by the separation, consumed almost 25 minutes (I Tr. 103). When Cooke finally reached the pickup, less than 10 minutes elapsed before he discovered the marijuana, placed Savage under arrest and returned to arrest Sharpe (I Tr. 105, 114, 120). In short, the officers' actions in stopping respondents and detaining them for a limited period to pursue a legitimate investigation into suspected criminal conduct is an example of good police work that meets the Fourth Amendment's standard of reasonableness.[9]

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[9] The majority's reliance (App. A, *infra*, 7a) on *Dunaway* v. *New York*, 442 U.S. 200 (1979), is misplaced. *Dunaway* did not hold that a detention that was extended by circumstances beyond the control of the officers is unreasonable under the Fourth Amendment. In *Dunaway*, police, acting on information (not amounting to probable cause) that implicated Dunaway in a murder, went looking for him and, after locating him at a neighbor's house, placed him in a police car and brought him to a police station without his consent. There, after being given *Miranda* warnings, Dunaway was interrogated in a custodial setting for a period of an hour, at which point he confessed to the crime. Although Dunaway had not been formally arrested and charged with a crime, the Court held that his detention without probable cause was unlawful because it was "in important respects indistinguishable from a traditional arrest" (442 U.S. at 212). In support of this characterization the Court noted the extended interrogation to which Dunaway was subjected, the involuntary transfer to the police station, and the use of an interrogation room, as well as the fact that he was not told he was free to go and in fact would not have been allowed to depart had he attempted to do so. Here, in contrast, there were no objective indicia that what was happening was a full custodial arrest or its functional equivalent, rather than a limited investigative detention. The detention was less extensive than in *Dunaway*, and its length was not attributable to the deliberate actions of the officers; moreover, respondents were not transported to a

2. Even if the court of appeals was correct in concluding that the more than momentary detention rendered the seizures of respondents unreasonable under the Fourth Amendment, it erred in holding that the marijuana discovered in respondent Savage's pickup truck was a suppressible fruit of the improper duration of the detention. In our view, this holding stems from an erroneous application of established Fourth Amendment principles to the facts at hand. As the Court explained in *United States* v. *Crews*, 445 U.S.

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police station and placed in an interrogation room, but were questioned briefly where they were stopped .

The court of appeals decisions cited by the majority below (App. A, *infra*, 8a) are similarly distinguishable. In *United States* v. *Chamberlin*, 644 F.2d 1262 (9th Cir. 1980), cert. denied, No. 80-1112 (June 29, 1981), the court held that the defendant's 20-minute detention was unreasonable in the absence of probable cause, specifically noting that the defendant "was not questioned briefly were he was found. He was placed in the back seat of a police car for twenty minutes." *Id.* at 1267. In *United States* v. *Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979), the defendant was removed from his car and taken to a Border Patrol office, where he was detained for three hours in an interrogation room pending the arrival of DEA agents. Finally, in *United States* v. *Miller*, 546 F.2d 251 (8th Cir. 1976), the court held that a gun discovered during a frisk of the defendant should have been suppressed because the defendant was "seized and wrongfully detained for an *unnecessarily* long period against his will" (*id.* at 253; emphasis supplied), and also because the officer did not have a sufficiently particularized suspicion that the defendant was carrying a weapon or otherwise posed a threat to the officer (*id.* at 254). While we do not necessarily agree with the results in these cases, none of them analyzes the propriety of the detention solely in terms of duration. Moreover, when contrasted with the decisions discussed above at pages 13-14 & note 7, *supra*, these decisions reflect the considerable uncertainty that surrounds this area of the law.

463, 471 (1980), evidence is to be suppressed only if it "is in some sense the product of illegal governmental activity." In this case, the discovery of the marijuana in the pickup did not in any meaningful way result from the fact that respondents' detentions were extended beyond a couple of minutes.

The court of appeals reasoned that Agent Cooke's discovery of the marijuana was a product of the seizures because "Cooke obviously would not have had the opportunity to smell the raw marijuana, and thus would have had no reason to search the truck, had Savage not been detained for longer than constitutionally permissible under an investigatory stop" (App. A, *infra*, 9a). However, this is precisely the sort of "but for" test that this Court has consistently rejected. See *Wong Sun* v. *United States*, 371 U.S. 471, 487-488 (1963); *Brown* v. *Illinois*, 422 U.S. 590, 603 (1975); *United States* v. *Ceccolini*, 435 U.S. 268, 276 (1978). A proper fruits analysis should have focused instead on whether the information establishing that there was probable cause to believe that the pickup contained marijuana was obtained by Agent Cooke through exploitation of the hypothetically overlong detentions of respondents. This entails a separate inquiry as to each respondent.

With respect to respondent Savage, we submit that the information that a strong odor of marijuana emanated from the pickup truck was immediately discoverable, and thus, although discovery of that information was delayed, the information itself should be deemed a fruit of the lawful stop and not of the arguendo unlawful prolongation of the detention. At the time of the initial stop of respondent Savage's pickup, Agent Cooke was well acquainted with the distinctive odor of marijuana; the extended

nature of Sharpe's detention clearly did not enhance Cooke's ability to smell and accurately identify that odor. See *United States* v. *Crews*, *supra*, 445 U.S. at 472. Moreover, there is no reason to suppose that the odor of marijuana from the pickup became more pronounced, and thus more easily discoverable, as a result of the prolonged detention. Accordingly, this is not a situation in which suppression is warranted because the detention was "unduly prolonged in order to gain more information"; instead, the information was "obtained through [detection of the readily apparent odor of marijuana] and not through the detention." *Michigan* v. *Summers*, *supra*, slip op. 9-10 (footnote omitted).[10]

As to respondent Sharpe, the error of the court of appeals is much clearer. The discovery of the marijuana was a product of the stop of Savage, and plainly not the result of any official impropriety connected with the stop and detention of Sharpe. Accordingly, the discovery of the marijuana "invaded no right of privacy of person * * * which would entitle [Sharpe] to object to its use at his trial." *Wong Sun* v. *United States*, *supra*, 371 U.S. at 492.

3. The warrantless search issue in this case is similar to that presented in *United States* v. *Ross*, No. 80-2209, argued March 1, 1982. In *Ross*, the District of Columbia Circuit held that the Fourth Amendment was violated by a warrantless search, based upon probable cause, of a closed but unsealed paper bag found in the trunk of the defendant's automobile during a lawful search of the vehicle. As we

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[10] This contrasts sharply with the situation in *Dunaway*, where it was precisely the prolongation of the suspect's detention and interrogation that produced his confession.

argue in our brief in *Ross*,[11] there are certain types of containers, including paper bags and burlap bales, with respect to which an individual's privacy interest is sufficiently diminished to permit warrantless searches on probable cause. In addition, we argue in *Ross* that no warrant is required to search a container—particularly one without substantial privacy attributes—seized during a lawful warrantless automobile search. If the Court accepts either of these arguments in *Ross*, then the holding of the court of appeals on the warrantless search issue must be rejected.

Even if the Court were to reject our arguments in *Ross*, the holding of the court below cannot stand. Although a paper bag is not generally associated with items of a personal or private nature, it may be used to carry such items. The number and appearance of the bales in this case, however, strongly suggested, as Judge Russell noted in dissent (App. A, *infra*, 30a-31a), that they contained, at most, some bulk agricultural commodity to which little expectation of privacy attaches—if anything, less than is associated with a paper bag. Moreover, the clearly discernable odor of marijuana that emanated from the bales exposed their contents to "plain smell," the olfactory equivalent of "plain view." Accordingly, no warrant was necessary to inspect the contents of the bales because a person cannot claim a reasonable expectation of privacy in a container, such as a kit of burglar tools or a gun case, whose contents are readily apparent.[12] See *Robbins* v. *California*, *supra*, slip

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[11] We are sending respondents copies of our brief in *Ross*.

[12] Judge Russell correctly noted (App. A, *infra*, 31a; emphasis in original) that there is no merit to the argument that "the bales *might* have contained personal items, since some-

op. 6-7 (plurality opinion); *Arkansas* v. *Sanders*, *supra*, 442 U.S. at 764-765 n.13. In short, as Judge Russell concluded (App. A, *infra*, 33a-34a):

> If "social norms" provide the test for determining whether articles found in an automobile enjoy an "expectation of privacy" as "repositories of personal effects," it is plain * * * that 2,629 pounds of marijuana, the odor of which is easily detectable, stored in a truck in forty-three bales of sixty pounds each, can hardly be considered by reasonable "social norms" to be the "repositories of personal effects."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

ELLIOTT SCHULDER
Assistant to the Solicitor General

JOHN F. DEPUE
Attorney

MARCH 1982

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one might just as easily place socks, underwear, and a toothbrush in a gun case or in a burglar's kit."

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS
FOURTH CIRCUIT

Nos. 79-5314, 79-5315

WILLIAM HARRIS SHARPE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

DONALD DAVIS SAVAGE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Argued Jan. 8, 1981

Decided Sept. 4, 1981

Before WINTER, RUSSELL and ERVIN, Circuit Judges.

ERVIN, Circuit Judge:

William Sharpe and Donald Savage were indicted for possession with intent to distribute a controlled substance (marijuana) under 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2.[1] At the hearing on the motions to

[1] 21 U.S.C. § 841(a)(1) states that "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."

[Footnote continued on page 2a]

suppress, which was conducted during the bench trial of these charges, Sharpe and Savage challenged the admission of certain evidence as the fruit of unlawful searches and seizures in violation of the Fourth and Fourteenth Amendments. The district court denied the motions and consequently found them guilty under the above statutes. We find the denial of the motions to suppress to be error and reverse.

I.

On June 9, 1978, Luther Cooke, an agent with the Drug Enforcement Administration (DEA), on patrol in an unmarked car along the coast of North and South Carolina, an area under surveillance for suspected drug trafficking, spotted a pickup truck with an attached shell camper, followed by a Pontiac. Observing that the truck was riding low in the rear and appeared overloaded, and that a quilted material covered the rear window of the camper, Cooke proceeded to follow the vehicles south. After approximately twenty miles, Cooke determined that he would make an investigatory stop of the vehicles, and he dispatched a request for aid, to which South Carolina Highway Patrolman Thrasher responded.

Some time after Thrasher joined the procession, the Pontiac and the truck turned onto a loop road through a campground. At no time prior to the turn had the occupants of the truck or vehicle signaled to

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[1] [Continued]

18 U.S.C. § 2(a) directs that "[w]hoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal," and § 2(b) states that "[w]hoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

or communicated with each other, and they did not attempt to do so as they drove the loop road through the campground. Thrasher later testified, however, that the truck and Pontiac were speeding as they drove along that road. At the end of the loop, the vehicles turned back onto the main coastal highway and again proceeded south toward Myrtle Beach.

Shortly thereafter, Cooke stopped the Pontiac and Thrasher stopped the truck. Cooke approached the Pontiac's occupants and identified himself. He requested and received an operator's license from the driver, Sharpe; the license was in the name of Raymond J. Pavlovich. Sharpe and his passenger Davis (the charges against whom were later dropped) were not told why they had been stopped. Several minutes later, Cooke radioed the local police for assistance, and two officers from the Myrtle Beach Police Department eventually arrived, in uniform and armed. Asking the local police to "maintain the situation," Cooke turned custody of Sharpe and Davis over to them and left to join Thrasher, who was with the truck a few blocks further south.

After stopping the truck, Thrasher had approached it with his revolver drawn, had ordered the driver to get out of the truck and to assume a spread-eagle position against its side, and had searched him. At Thrasher's request, the driver had produced a Florida license identifying him as William Savage and a bill of sale for the truck in the name of Pavlovich. Thrasher gave Savage no reason for the stop, but indicated that he would hold him there until Cooke arrived. Savage had then requested the return of his license and permission to leave. Thrasher had refused to return the license and told Savage that he was not free to leave, as he was under custodial arrest, and

that he could detain Savage on speeding charges if necessary.

When Cooke arrived approximately fifteen minutes after the truck had been stopped, he identified himself as a DEA agent, and Thrasher handed him Savage's license and the bill of sale. Cooke twice requested that he be allowed to search the camper and was refused both times. Cooke then stepped onto the rear bumper and observed that it did not lower appreciably. He leaned against the rear of the camper, breathed deeply, and announced that he detected the smell of marijuana. Cooke removed the keys from the ignition, unlocked the camper and searched it, finding a number of highly compressed, well-wrapped burlap bales but no marijuana residue.

After the search of the camper, Cooke placed Savage under arrest and left him in Thrasher's custody while he returned to the Pontiac, where he placed Sharpe under arrest. By the time Sharpe was arrested, approximately thirty to forty minutes had elapsed since Cooke had first stopped the Pontiac.

Cooke then assembled the various parties and vehicles and led them to the Myrtle Beach police station. That evening the truck was driven to the Federal Building in Charleston, and two or three days later, Cooke supervised the unloading of the truck, which contained forty-three intact bales. Eight randomly selected bales were then searched, and analysis of samples taken from them revealed that the bales contained marijuana. No search warrant was obtained prior to the unloading and analyzing of the bales and their contents. Cooke retained two of the eight bales as evidence and stored them in a vault in his office; the rest were destroyed by fire, under the direction of the Assistant United States Attorney and without permission of the district court.

II.

We consider first whether the vehicle stops and the detentions of Sharpe and Savage were unlawful seizures under the Fourth and Fourteenth Amendments.

The Fourth Amendment, applicable to the states through the Fourteenth Amendment, *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), provides that "[t]he right of the people to be secure in their persons . . . and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ." U.S.Const. amend, IV. The amendment has been construed generally to allow a law enforcement official to stop a moving vehicle without a warrant and for less than probable cause, if he has an articulable, reasonable suspicion that either the vehicle or any of its occupants is subject to seizure for violation of the law, *see Delaware* v. *Prouse*, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660 (1979), and has been read in particular to allow investigatory field stops of vehicles suspected of drug trafficking, *see, e.g., United States* v. *Jiminez*, 602 F.2d 139, 142 (7th Cir. 1979); *United States* v. *Soto*, 591 F.2d 1091, 1099 (5th Cir.), *cert. denied*, 442 U.S. 930, 99 S.Ct. 2862, 61 L.Ed.2d 298 (1979); *United States* v. *Montgomery*, 561 F.2d 875, 879 (D.C.Cir. 1977); *United States* v. *Garcia-Rodriguez*, 558 F.2d 956, 964 (9th Cir. 1977), *cert. denied*, 434 U.S. 1050, 98 S.Ct. 900, 54 L.Ed.2d 802 (1978).

Even though the reasonable suspicion standard requires less evidence of wrongdoing than does a showing of probable cause, the law does not free law enforcement officials from all restrictions concerning vehicle stops. Rather, it imposes upon them two sig-

nificant requirements: first, the reasonable suspicion of illegality must not be based simply on subjective belief but must be supported by articulable and objective facts, and second, the stop must be brief. *See, e.g., United States* v. *Cortez*, —— U.S. ——, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *see also Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979).

We can assume without deciding that Cooke had an articulable and reasonable suspicion that Sharpe and Savage were engaged in marijuana trafficking when he and Thrasher stopped the Pontiac and the truck. We conclude, however, that the stops failed to meet the requirement of brevity.

We cannot overemphasize the importance of the brevity requirement for investigatory stops predicated upon less than probable cause; indeed, it is the transitory nature of the stop that justifies the elimination of the probable cause requirement. We note that the Supreme Court in *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), heavily relied upon the short length of a stop on the street and a frisk of weapons in fashioning an exception to the probable cause requirement. Furthermore, when the Court transposed the *Terry* stop and frisk rationale to the vehicle stop situation, it was careful to emphasize the de minimis nature of such stops in justifying the intrusion under the Fourth Amendment. In *Brignoni-Ponce*, for instance, the Court noted that the Fourth Amendment required a weighing of the public interest against the interference with individual liberty that a stop causes, and it justified the border patrol investigatory stop in that case on the ground that the intrusion was "modest," usually "consum[ing] no

more than one minute," and involving only "a brief question or two." 422 U.S. at 880, 95 S.Ct. at 2579-80. The Court further cautioned that "any further detention or search must be based on consent or probable cause." *Id.* at 882, 95 S.Ct. at 2580; *see also United States* v. *Cortez*, —— U.S. at ——, 101 S.Ct. at 694 (denominating investigatory stops as brief).

The stops and detention in this case cannot be described as brief: Sharpe was detained without probable cause for arrest for thirty to forty minutes before Cooke returned to the Pontiac to arrest him, and Savage was held under custodial arrest without probable cause by Thrasher for at least fifteen minutes before being questioned and finally arrested by Cooke. Indeed, the length of the detentions effectively transformed them into de facto arrests without bases in probable cause, unreasonable seizures under the Fourth Amendment. The teaching of the recent case *Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979), is enlightening here. In *Dunaway*, the Court held that police violated the Fourth Amendment when, without probable cause but with a reasonable suspicion of illegal conduct, they seized an individual and transported him to the police station for interrogation. In so holding, the Court noted that Dunaway was not merely questioned briefly but was instead transported to the station for interrogation and would have been restrained if he had tried to leave; in sum, the detention "was in important respects indistinguishable from a traditional arrest," *id.* at 212, 99 S.Ct. at 2256, and, not being grounded on probable cause, it was an unconstitutional seizure.

Like the detention in *Dunaway*, the lengthy detentions of Sharpe and Savage by law enforcement officers who had no intention of allowing them to leave custody closely resembled traditional arrests. Because

probable cause did not exist prior to the detentions, we must view them as illegal seizures under the Fourth and Fourteenth Amendments. *See United States* v. *Chamberlin*, 644 F.2d 1262 (9th Cir. 1980) (twenty minute detention of individual in back of parked car, on the basis of a reasonable suspicion that criminality was afoot but without probable cause, was unlawful); *United States* v. *Perez-Esparza*, 609 F.2d 1284 (9th Cir. 1979) (three hour detention at border checkpoint station, including two and one-half hour delay pending the arrival of DEA agents, following valid investigatory field stop of a vehicle, constituted an illegal arrest); *see also United States* v. *Miller*, 546 F.2d 251 (8th Cir. 1976) (frisk for weapons following ten to fifteen minute house search pursuant to valid search warrant not valid under *Terry*, because individual was detained longer than necessary); *cf. United States* v. *Vasquez-Santiago*, 602 F.2d 1069 (2d Cir. 1979), *cert. denied*, 447 U.S. 911, 100 S.Ct. 2998, 64 L.Ed.2d 861 (1980) (relatively brief detention of individual in an airport on the basis of a reasonable suspicion of narcotics violation, was not an unconstitutional intrusion, the detention involving only a couple of minutes of questioning).

III.

Having determined that Sharpe and Savage were illegally detained, we must next inquire whether the bales of marijuana Cooke uncovered during his search of the truck should have been suppressed as fruits of the illegality. *Wong Sun* v. *United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963), provides the standard by which we test the admissibility of the incriminating evidence, the appropriate inquiry being "whether, granting establishment of the primary illegality, the evidence to which the instant objection is

made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." 371 U.S. at 488, 83 S.Ct. at 417 (quoting Maguire, *Evidence of Guilt*, 221 (1959)).

We conclude that this case falls within the first category. Cooke obviously would not have had the opportunity to smell the raw marijuana, and thus would have had no reason to search the truck, had Savage not been detained for longer than constitutionally permissible under an investigatory stop. Clearly a product of Cooke's "exploitation of [the] illegality," evidence of the discovery of the bales should have been suppressed.

The government's argument that the smell of the marijuana supplied probable cause for Cooke to search the truck and thus that the evidence was properly admitted fails to persuade us that the search was constitutional. While we acknowledge that the odor of raw marijuana may provide probable cause to search a vehicle legitimately stopped, *see, e.g.*, United States v. *Dien*, 609 F.2d 1038 (2d Cir. 1979), *aff'd on rehearing*, 615 F.2d 10 (1980); *United States* v. *Rivera*, 595 F.2d 1095 (5th Cir. 1979), it could not have done so in this case: Cooke's smelling the marijuana was so intertwined with the circumstances of the unlawful detentions that it could not have purged the illegal taint of those detentions and could therefore not have served as probable cause for a search. The bales thus were illegally seized, and the district court erred when it denied the motion to suppress.[2]

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[2] Because we have determined that the bales of marijuana should have been suppressed, we do not find it necessary to reach the question whether the district court improperly refused to suppress Sharpe's license and the bill of sale for the truck.

IV.

The bales of marijuana should have been suppressed for another, equally compelling, reason: even if there had been no illegality to taint the discovery of the bales, Cooke should have obtained a warrant before allowing a search and analysis of the bales to proceed in Charleston two or three days after the stops and detentions. We find authority for our conclusion in the Supreme Court's recent decision in *Robbins* v. *California*, —— U.S. ——, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981).

The *Robbins* Court reversed a conviction for drug offenses on the ground that a warrantless search of packages of marijuana wrapped in opaque green plastic and stored in the recessed luggage compartment of a station wagon was unconstitutional. Justice Stewart, in a plurality opinion joined by Justices Brennan, White, and Marshall, set forth a bright line rule that any closed, opaque container found in a vehicle during a lawful search may not be opened without a warrant. Relying on the Court's decisions in *United States* v. *Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), in which a warrantless search of a footlocker filled with marijuana and seized from the open trunk of a parked automobile was held unconstitutional, and in *Arkansas* v. *Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), in which the Court held that the warrant requirement applied to the search of a suitcase filled with marijuana and found in the trunk of a stopped vehicle, the plurality rejected the government's argument that a closed container in a vehicle may be subject to a warrantless search under the automobile exception. It furthermore rejected a "worthy container" rule, concluding that there is no constitutional distinction to be made among various closed

containers such as suitcases, briefcases, portfolios, duffle bags, and boxes: all closed containers manifest an individual's reasonable expectation of privacy in their contents, unless a container by its very appearance betrays an illegal purpose or its contents are exposed to plain view. *See Arkansas* v. *Sanders*, 442 U.S. at 764-65 n.13, 99 S.Ct. at 2593-94 n.13. The plurality stressed, moreover, that the Fourth Amendment does not draw a distinction between personal and impersonal effects; as it succinctly stated, "Once placed within [a closed, opaque container], a diary and a dishpan are equally protected by the Fourth Amendment." —— U.S. at ——, 101 S.Ct. at 2846.

Joining in the judgment but not the opinion of the plurality, Justice Powell in a concurring opinion rejected the bright line rule, instead premising his conclusion that the search was unlawful on the ground that the defendant had a reasonable expectation of privacy in the carefully wrapped and sealed packages. While acknowledging the benefits of a bright line rule, Justice Powell reasoned that the plurality's rule in this case placed an unduly heavy burden on law enforcement officers to obtain warrants for the search of trivial containers.

Applying *Robbins*, we think that under either the plurality's bright line rule or Justice Powell's reasoning in concurrence, the warrantless search of the bales in the back of the truck was unconstitutional. The well-packaged bales [3] were located in the equivalent of a luggage compartment and were "closed containers" within the meaning of the plurality opinion, and,

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[3] Each bale consisted of a tube of marijuana wrapped first in paper bags, then in a taped plastic bag, and finally in burlap tied with twine. Cooke acknowledged in his testimony that the marijuana was extremely well packaged.

as their appearance did not manifest their contents,[4] the warrantless search was unconstitutional under the bright line rule. Sharpe and Savage, moreover, had a reasonable expectation of privacy in the bales, as evidenced by the careful packaging and sealing of the bales and the placing of them inside the curtained camper.

Cooke therefore should have obtained a warrant prior to searching the bales. Because he did not do so, the marijuana should have been suppressed on this ground, as well as on the ground that the initial seizure of the bales was unlawful.[5]

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[4] Sharpe and Savage produced ample evidence of the virtual identity in appearance of the marijuana bales and bales of tobacco, cotton goods, and hemp.

[5] Another ground upon which Sharpe and Savage challenge the admission of the marijuana into evidence was the prejudicial effect of the destruction of the marijuana. Because we conclude that the marijuana should have been suppressed, we do not find it necessary to decide this question. The procedure that the government followed in destroying the evidence—without defense counsel's knowledge and without leave from the district court—nevertheless seriously concerns us, as it did the district court, and compels comment.

We note that the claim of prejudice in this instance is colorable. Sharpe and Savage argue that Cooke could not have smelled the tightly packaged marijuana through the closed and well-sealed camper door. They further submit that, had forty-one of the forty-three bales not been destroyed, it would have been possible to reconstruct the conditions of the stop and then to show by scientific proof the difficulty or impossibility of smelling the marijuana under those circumstances. By this means, they could have attacked Cooke's credibility and the existence of probable cause to search the truck. The destruction, of course, made the simulation impossible.

The better procedure would have been for the government to have petitioned the district court for an order allowing

Having concluded that the marijuana should have been suppressed either because its discovery was the fruit of an illegal detention, or because the warrantless search of the bales was unlawful, we reverse Sharpe's and Savage's convictions.

REVERSED.

DONALD RUSSELL, Circuit Judge dissenting:

The defendants/appellants were plainly guilty. Unable to bribe their way out after being caught, they now ask this Court for protection and the majority would give such protection on the theory that the validity of a *Terry*-type stop is to be determined by the stop-watch and not by the totality of the circumstances of the stop. I cannot agree and accordingly dissent. My reasons for such disagreement are:

I.

The Fourth Amendment preserves "[t]he right of the people to be secure . . . against unreasonable searches and seizures . . . ." The amendment does not prohibit all searches and seizures, only *unreasonable* searches and seizures. *Elkins* v. *United States*, 364 U.S. 206, 222, 80 S.Ct. 1437, 1446, 4 L.Ed.2d 1669 (1960). In *Terry* v. *Ohio*, 392 U.S. 1, 16, 88 S.Ct. 1868, 1877, 20 L.Ed.2d 889 (1968), the Supreme Court defined "seizure": "It must be recognized that whenever a police officer accosts an individual and

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the destruction, and for the defendants to have received notice of the impending destruction and to have had access to the seized evidence prior to the destruction. Such a procedure ensures that defendants are not prejudiced by the government's handling of evidence. *See United States* v. *Heiden*, 508 F.2d 898 (9th Cir. 1974) (concurring opinion).

restrains his freedom to walk away, he has 'seized' that person." As a general rule "the police must, whenever practicable, obtain judicial approval of searches and seizures through the warrant procedure . . . .", *id.* at 20, 88 S.Ct. at 1879 (citation omitted), "[b]ut we deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subject to the warrant procedure." *Id.*

In determining the reasonableness of the actions of the police, the *Terry* Court set forth a two part test for stopping a citizen: "Whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* For the first part of this test, the officers must be able to point to "specific and articulable facts," *id.* at 21, 88 S.Ct. at 1880, which provide some objective manifestation that the person stopped is . . . engaged in criminal activity." *United States* v. *Cortez*, —— U.S. ——, ——, 101 S.Ct. 690, 694, 66 L.Ed.2d 621 (1981). The second part, involving the conduct of the stop itself, depends on the totality of the circumstances: "The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. . . . We need not develop at length in this case, however, the limitations which the Fourth Amendment places upon a protective seizure and search for weapons. These limitations will have to be developed in the concrete factual circumstances of individual cases." 392 U.S. at 28-29,

88 S.Ct. at 1883-84. *See also id.* at 15, 19, 88 S.Ct. at 1876, 1878. Subsequent to *Terry*, a balancing test has been used by the Court in examining the reasonableness of the search and seizure. *See, e.g., Brown* v. *Texas*, 443 U.S. 47, 50-51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979); *Delaware* v. *Prouse*, 440 U.S. 648, 654, 99 S.Ct. 1391, 1396, 59 L.Ed.2d 660 (1979); *Dunaway* v. *New York*, 442 U.S. 200, 219, 99 S.Ct. 2248, 2260, 60 L.Ed.2d 824 (1979) (White, J., concurring); *Michigan* v. *Summers*, —— U.S. ——, —— n.12, 101 S.Ct. 2587, 2593 n.12, 69 L.Ed.2d 340 (1981); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 108-09, 98 S.Ct. 330, 332, 54 L.Ed.2d 331 (1977); *Rawlings* v. *Kentucky*, 448 U.S. 98, 110 n.5, 100 S.Ct. 2556, 2564, 65 L.Ed.2d 633 (1980); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-84, 95 S.Ct. 2574, 2578-52, 45 L.Ed.2d 607 (1975); *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554-56, 96 S.Ct. 3074, 3081-82, 49 L.Ed.2d 1116 (1976).

The Court in these cases has agreed that Agent Cooke and Patrolman Thrasher had sufficient grounds for stopping Sharpe and Savage, but the majority, rather than examine the totality of the circumstances surrounding this stop, holds that an objective criterion of any investigatory stop is that it must be brief, and that the investigatory stop here was not brief. Such objective requirement has never been recognized by the Supreme Court, and I do not agree that this stop, under the circumstances, was not brief within the concept of a *Terry*-stop.

To be sure, the Court in *Brignoni-Ponce* wrote that the roving border patrol stop lasted " 'no more than a minute' " and required " 'a response to a brief question or two and possible production of a document evidencing a right to be in the United States.' " 422

U.S. at 880, 95 S.Ct. at 2579-80 (quoting Brief for United States at 25). And, in *Martinez-Fuerte*, the Court noted that the stops in the secondary inspection area lasted three to five minutes on the average. 428 U.S. at 547, 96 S.Ct. at 3078. These statements are, however, descriptive, not prescriptive, and are to be considered along with all other circumstances when evaluating the reasonableness of the search and seizure. Rather than creating a rule that the investigatory stop must be brief in some objective and absolute measure, I would hold that the Court should look at—as it must when looking at the grounds for the stop itself—the totality of the circumstances. *See United States* v. *Cortez*, —— U.S. at ——, 101 S.Ct. at 694; *United States* v. *Bull*, 565 F.2d 869 (4th Cir. 1977), *cert. denied*, 435 U.S. 946, 98 S.Ct. 1531, 55 L.Ed.2d 545 (1978); *United States* v. *Constantine*, 567 F.2d 266, 267 (4th Cir. 1977) (per curiam), *cert. denied*, 435 U.S. 926, 98 S.Ct. 1492, 55 L.Ed.2d 520 (1978); *United States* v. *Dodier*, 630 F.2d 232, 234-35 (4th Cir. 1980).

Not only do I not agree to the mechanical application of the "brief stop" rule created by the majority, I also believe that the facts of this case demonstrate that the intrusion was minimal and that such delay as there was was occasioned by the defendants themselves. DEA Agent Cooke had been following the Pontiac driven by Sharpe and the truck and camper driven by Savage for some twenty-one miles when he decided to stop the vehicles on the basis of what the majority conceded to have been "specific and articulable facts" providing some "objective manifestation . . . [of] criminal activity." Before he could do so, the two vehicles, traveling in tandem for the entire distance, turned off the main road and onto a

campground road where they drove fifty-five to sixty miles per hour through the thirty-five mile per hour zone, plainly attempting to elude Agent Cooke; after completing the loop, the vehicles turned back onto the main highway. Cooke meanwhile had engaged Patrolman Thrasher to help him pursue the vehicles. As they proceeded in the middle of three south-bound lanes with the Pontiac first, followed by the truck, then Cooke, and finally Thrasher in his patrol car, Cooke asked Thrasher to pull the Pontiac and truck over.[1] Thrasher moved into the left lane and pulled alongside the Pontiac and signaled him over. Then, according to Cooke:

> The Pontiac started over the right and as he moved into the right-hand lane, Mr. Thrasher started to move over also and the Ford pickup cut between the two vehicles, between the Highway Patrol car and the Pontiac and proceeded on down the road.

Thrasher testified that as Sharpe pulled over, Savage "continued south almost hitting my car." When the Pontiac pulled over and the truck kept going, Cooke decided to stay with the Pontiac while Thrasher followed the truck, finally pulling it over a half mile from the Pontiac.

This ploy by Savage in the truck is the basic cause of the delay complained of by the appellants; there is no evidence of any unnecessary delay on the part of the officers. At trial Agent Cooke testified that he

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[1] Cooke was not a uniformed officer, nor was he in a marked car. After stopping Sharpe, however, he placed a flashing blue light on the dash of his car. Thrasher, on the other hand, was a uniformed officer and drove a marked car. This may account for Cooke asking Thrasher to stop the cars.

asked for identification from Sharpe and Mr. Davis, a passenger in Sharpe's car, and then tried to contact Patrolman Thrasher on the radio. Apparently Thrasher was out of his car because Cooke was unable to contact him for "a few minutes." Ten minutes after Cooke stopped Sharpe, officers from the Myrtle Beach Police Department arrived to remain with Sharpe while Cooke joined Thrasher and Savage.

During the time that Cooke was with Sharpe and Davis, Thrasher had checked Savage's identification and the registration on the truck. Savage produced a Florida driver's license and a bill of sale for the truck dated the day before in the name of Pavlovich. The bill of sale was from Atlanta while the truck had South Carolina plates. Savage said that the truck belonged to a friend, that it was empty, and that he was taking it to get the shocks fixed. When Cooke arrived, Savage again maintained that the truck was empty and that he was taking it on behalf of a friend to fix the shocks. At this point Cooke stepped on the back bumper and the truck did not move. It thus was obvious that the truck was heavily loaded. The officer then smelled marijuana. The truck was opened and the marijuana discovered.

Cooke testified that once he reached Savage the whole process of checking Savage's identification, stepping on the rear bumper of the truck to see if it was heavily loaded, and smelling the marijuana took one or two minutes. Savage was then arrested and placed in the patrol car with Thrasher,[2] while Cooke returned to the Pontiac where he arrested Sharpe and Davis. (Charges against Davis were later dismissed.)

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[2] Savage offered $30,000 to Patrolman Thrasher if he would let him "hit the beach and run."

It is significant that the entire process from stop to arrest took at most thirty to forty minutes—most of the time being consumed by Cooke trying to contact Thrasher by radio and Cooke traveling between the two vehicles.[3]

This is not the custodial detention found unsupportable in *Dunaway* v. *New York*, 442 U.S. 200, 99 S.Ct, 2248, 60 L.Ed.2d 824 (1979). In *Dunaway*, the police found the suspect at a neighbor's home and, without probable cause to arrest him, took him to the police station for questioning. Within an hour, he had made a statement. *Id.* at 203 n.2, 99 S.Ct. at 2251. The Court noted, as one of the factors in its decision to suppress the questioning and its fruits, the fact that he "was not questioned briefly where he was found," but instead "was taken from a neighbor's home to a

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[3] The thirty to forty minute delay can only be invoked in favor of Sharpe. Cooke spent ten to fifteen minutes with Sharpe and then proceeded to join Thrasher and Savage. Once Cooke reached Savage the questioning took one or two minutes, after which Cooke smelled the marijuana. Thus Savage can complain of a delay of ten to fifteen minutes, at most.

The Model Code of Pre-Arraignment Procedure § 110.2(1) (1975) suggests that an officer may "order a person to remain in the officer's presence near such place for such period as is reasonably necessary for the accomplishment of the purposes authorized in the Subsection, but in no case for more than twenty minutes." Even under this guideline the initial stop of Sharpe was good and the stop and arrest of Savage would be good.

If we really wished to split hairs, we should subtract the time it took Savage to go the additional half mile, and get out of the truck. This mechanical hair-splitting knows no bounds. *See* Van Graafeiland, "The Second Circuit Review—1976-77 Term, Foreword—The Constitution and Numbers Game," 44 Brooklyn L.Rev. 747 (1978).

police car, transported to a police station, and placed in an interrogation room." *Id.* at 212, 99 S.Ct. at 2256. Under the circumstances, it is not difficult to see that the police in *Dunaway* had clearly crossed the rational bounds of a *Terry* stop and had arrested the suspect without probable cause. Indeed, the Supreme Court concluded that "the detention of petitioner was in important respects indistinguishable from a traditional arrest." *Id.*

In contrast, here the officers conducted a *Terry* stop "by the book." They stopped Sharpe and Savage, frisked them, and asked for identification. Agent Cooke walked to the back of the truck, stepped on the bumper, and then said he smelled marijuana. There was no abusive handling of the suspects, no prolonged questioning, and no intrusive probing into the suspects' vehicles. Furthermore, Savage had already indicated that the truck was not his and that it was empty. Thus the initial questioning of Sharpe and Savage only aroused Agent Cooke's suspicion even more—a factor we should consider. See 3 W. LaFave, *Search & Seizure* § 9.2 at 38, 40.[4]

This simply does not rise to the level of the unnecessary delay criticized by the Eighth Circuit in *United States* v. *Miller*, 546 F.2d 251 (8th Cir. 1976), or by the Ninth Circuit in *United States* v. *Perez-*

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[4] I think that it is clear that, *Dunaway* notwithstanding, Patrolman Thrasher might have escorted Savage back to Agent Cooke, Sharpe, and the Pontiac and still been within the proper bounds of a *Terry* stop. *See, e.g., United States* v. *Oates*, 560 F.2d 45 (2d Cir. 1977); *United States* v. *Short*, 570 F.2d 1051 (D.C. Cir. 1978); *United States* v. *Wylie*, 569 F.2d 62 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944, 98 S.Ct. 1527, 55 L.Ed.2d 542 (1978). Surely Thrasher's keeping Savage with his vehicle was the least restrictive of permissible alternatives.

Esparza, 609 F.2d 1284 (9th Cir. 1980), both cited by the majority. In *Miller* the police searched a house pursuant to a warrant. After finding the drugs they were searching for, the police decided to search and frisk those present including the defendant, who was a visitor in the house and had indicated a desire to leave. The search revealed a gun, and the defendant was convicted of receipt of a firearm by a previously convicted felon. The Eighth Circuit, in reversing the conviction, found that if the officers feared for their safety, the search—occurring some ten to fifteen minutes after the search began—should have been conducted when the officers first arrived. In addition, it should be noted that the search of the defendant was not related to the officers' purpose in the house, which was to search for drugs on the premises, *see Ybarra* v. *Illinois*, 444 U.S. 85, 100 S.Ct. 338, 62 L.Ed.2d 238 (1979), nor was the defendant the owner of the house. *See Michigan* v. *Summers*, —— U.S. ——, 101 S.Ct. 2587, 69 L.Ed2d 340 (1981).

In *Perez-Esparza*, the Border Patrol, acting on a tip from a reliable informant that the defendant was smuggling drugs in his car, detained the defendant for two and a half hours until DEA agents could arrive from San Diego. The Court did not, as the majority does in this case, apply any stop-watch rule in determining the validity of the officers' action; it chose to rest its decision as I suggest we should do here, on the totality of the particular circumstances. The Ninth Circuit found that where the government had failed to justify the extreme delay, under the circumstances in the case, the defendant had been arrested without probable cause. The court specifically noted that "[w]e also do not consider whether when all officers who are competent to question a suspect are several minutes away, it is constitution-

ally permissible to detain a suspect briefly on less than probable cause." 609 F.2d 1284, 1287 n.2 (citing *United States* v. *O'Looney*, 544 F.2d 385 (9th Cir.), *cert. denied*, 429 U.S. 1023, 97 S.Ct. 642, 50 L.Ed.2d 625 (1976)). The court then examined the difference in motivation behind taking a suspect to the police station for brief questioning because they cannot adequately examine him at the scene as in *O'Looney*,[5] and taking a suspect to the police station for an unnecessarily long interrogation which might just as easily have been conducted at the scene, a neighbor's house. *See Dunaway* v. *New York*, 422 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824 (1979). The court then continued:

> We do not think *Dunaway* forecloses using *Terry*-type analysis to solve such problems, when they arise in on-the-scene, unplanned, questioning. The normative distinction between *Dunaway* and *O'Looney* lies in the reasonableness of the police motivations for detaining the respective defendants.
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> Nevertheless, we need not reach the question whether *O'Looney* rather than *Dunaway*, should govern on the facts of the case before us, because the record does not supply sufficient police justification for the detention. There is nothing in the

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[5] In *United States* v. *O'Looney*, 544 F.2d 385 (9th Cir.) *cert. denied*, 429 U.S. 1023, 97 S.Ct. 642, 50 L.Ed.2d 625 (1976), O'Looney, suspected of exporting guns to Ireland for use by the Irish Republican Army, was detained at the police station until Alcohol, Tobacco, and Firearms' agents could arrive to talk with him. The court held that "[i]t was not unreasonable to detain O'Looney temporarily at the station to await the arrival of federal officers who are more familiar with federal firearms laws and more experienced in their enforcement." *Id.* at 389.

> record to demonstrate why the Border Patrol agents stationed at the San Clemente checkpoint, who may have been experienced in drug smuggling cases, could not adequately have questioned Perez-Esparza immediately after stopping him. The record is silent as to any real justification for the two and one-half hour detention pending arrival of the DEA agents from San Diego, and the detention was thus unnecessary, even if not quite so egregious as the police conduct in *Dunaway*. Thus, as in *Dunaway*, the detention for custodial interrogation was impermissible on less than probable cause.

A similar conclusion was reached in *United States* v. *Richards*, 500 F.2d 1025 (9th Cir. 1974), *cert. denied*, 420 U.S. 924, 95 S.Ct. 1118, 43 L.Ed.2d 393 (1975). The court stated that "[t]he test for determining the lawfulness of such police detentions is whether under the totality of the circumstances, they are reasonable," and then found that "[a]lthough appellant's eventual detention for over an hour cannot be considered a 'brief' or 'momentary' stop, in the particular circumstances of this case we belive that this extended detention was reasonable." *Id.* at 1029. *Cf. United States* v. *Mayes*, 524 F.2d 803 (9th Cir. 1975) (suspect held for an hour and a half while Border Patrol agents checked out his story); *United States* v. *Short*, 570 F.2d 1051, 1054-55 & n.7 (D.C. Cir. 1978) (suspect taken to scene of burglary for identification); *United States* v. *Wylie*, 569 F.2d 62, 70-71 (D.C.Cir. 1977) *cert. denied*, 435 U.S. 944, 98 S.Ct. 1527, 55 L.Ed.2d 542 (1978) (suspect returned to bank for questioning).

These cases provide no support for the *per se* rule offered by the Court today; rather they clearly hold

that we are entitled to look at all of the circumstances. Thus while an hour delay was not unreasonable in *O'Looney* or *Richards*, the fifteen minute delay in *Miller* was. Furthermore, *Miller* involved detention without "specific and articulable facts" while *O'Looney* and *Richards* involved *Terry* stops. We should also note that in *Michigan* v. *Summers*, —— U.S. ——, 101 S.Ct. 2587, 69 L.Ed2d 340 (1981), the defendant was detained for almost fifty minutes while the police searched his house, 49 U.S.L.W. 3674 (summary of oral argument), yet the Court passed this over by saying that "[a]lthough special circumstances or a prolonged detention, might lead to a different conclusion in an unusual case, we are persuaded that this routine detention of residents of a house while it was being searched for contraband pursuant to a warrant is not such a case." —— U.S. at —— n.21, 101 S.Ct. at 2595 n.21. *Cf. Rawlings* v. *Kentucky*, 448 U.S. 98, 107, 100 S.Ct. 2556, 2562, 65 L.Ed.2d 633 (1980) (suspects detained for forty-five minutes while officers obtained a search warrant).

The only delay in this case was not associated with the questioning of Sharpe and Savage, but strictly with the need for Cooke to talk with both drivers. After following them for twenty miles, there could be no question that they were traveling together and, in view of Savage's stunt, there can be little doubt that they did not wish to be stopped together, if at all. Agent Cooke was experienced in dealing with suspected drug traffickers, and so it was not unreasonable for Patrolman Thrasher to hold Savage briefly until Cooke could join them.[6]

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[6] Analogies to *Dunaway* and the problems attendant to custodial interrogation are thus misplaced. In *Dunaway* the Supreme Court found that stops at the border were *Terry*

I would hold that because of the deliberate actions of Sharpe and Savage to avoid being stopped together, the brief detention of the pair was not unreasonable and therefore not a violation of the Fourth Amendment. There being no Fourth Amendment violation, I would not suppress the evidence discovered from the search and seizure.

II.

The majority also holds that the "bright line" rule of *Robbins* v. *California*, —— U.S. ——, 101 S.Ct. 2841, 69 L.Ed.2d 744 (1981) (Plurality opinion), applies to forty-three burlap-wrapped bales each weighing about sixty pounds and containing a total of 2,629 pounds of marijuana. I cannot join the Court in such a finding, nor do I read support for such a ruling in *Robbins* or *Arkansas* v. *Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979).

The Fourth Amendment protects persons from "unreasonable searches and seizures" which invade the security of "their persons, houses, papers and effects." The Supreme Court has in turn declared

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stops in a "special context" because of the "importance of the governmental interest at stake." 442 U.S. at 210-11 n.13, 99 S.Ct. at 2255 n.13. *See United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-81, 95 S.Ct. at 2578-80 (1975). The governmental interest at stake here is of no less importance. We can take note that while South Carolina does not have serious problems with illegal aliens, it does have a substantial problem with drug smuggling. At trial Agent Cooke testified that in the two years prior to stopping the appellants, he personally had encountered "in excess of two hundred thousand pounds" of marijuana. At least three justices have also taken note of the seriousness of the trafficking in controlled substances. *United States* v. *Mendenhall*, 446 U.S. 544, 561-62, 100 S.Ct. 1870, 1881, 64 L.Ed.2d 497 (1980) (Powell, J., concurring).

that a search of a person or his property, as defined in the Amendment, without a warrant issued in conformity with the requirements of the Amendment's warrant clause is normally unreasonable and invalid *per se*. However, the Court has recognized, as an exception to the warrant requirement, that a search warrant is not necessary where there is probable cause to search an automobile stopped on a highway. *Carroll* v. *United States*, 267 U.S. 132, 153-54, 45 S.Ct. 280, 285, 69 L.Ed 543 (1925).

A number of reasons have been given for this exception. While this exception has been justified on the "inherent mobility" of the automobile, which makes the procurement of a warrant impracticable, the exception's basis "lies in the diminished expectation of privacy which surrounds the automobile." *United States* v. *Chadwick*, 433 U.S. 1, 12, 97 S.Ct. 2476, 2484, 53 L.Ed.2d 538 (1977). "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects." *Cardwell* v. *Lewis*, 417 U.S. 583, 590, 94 S.Ct. 2464, 2469, 41 L.Ed.2d 325 (1974) (plurality opinion).

Subsequent cases have followed this justification in reaching their conclusions. Thus the validity of searches of articles found in an automobile stopped on the highway has been governed by the presence or absence of a legitimate expectation of privacy in the article searched. Where there is such reasonable expectation of privacy, the Supreme Court has held that luggage which has been seized in connection with the stopping of an automobile may not be searched without a warrant. *Arkansas* v. *Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). The reason for such conclusion is that "luggage is a

common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy." *Id.* at 762, 99 S.Ct. at 2592 (relying on *Chadwick*, 433 U.S. at 13, 97 S.Ct. at 2484).

In amplifying on this reason the Court said that

> a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations. One is not less inclined to place private, personal possessions in a suitcase merely because the suitcase is to be carried in an automobile rather than transported by other means or temporarily checked or stored. Indeed, the very purpose of a suitcase is to serve as a repository for personal items when one wishes to transport them. Accordingly, the reasons for not requiring a warrant for the search of an automobile do not apply to searches of personal luggage taken by police from automobiles. We therefore find no justification for the extension of *Carroll* and its progeny to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police.

Id. at 764-65, 99 S.Ct. at 2593-94. The Court, however, was at pains to caution that "[n]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. . . There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not." *Id.* at 764 n.13, 99 S.Ct. at 2593-94 n.13.

During the last term of Court the issue involved in *Sanders* was re-examined in two cases. In the

first case the search was invalidated, *Robbins* v. *California*, —— U.S. ——, 101 S.Ct. 2841, 69 L.Ed2d 744 (1981) (plurality opinion); in the other, decided the same day, it was sustained. *New York* v. *Belton*, —— U.S. ——, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). Somewhat confusingly, a majority of the Supreme Court appears to have felt that the two cases should have been decided the same way, and six members of the Court were of the opinion that *Belton* was correctly decided. *See id.* at ——, 101 S.Ct. at 2865 (Stevens, J., concurring).

The majority, of course, relies on the plurality opinion in *Robbins* for support of its conclusion. However, *Robbins* is a tenuous precedent on which to plant a decision. The opinion itself was a plurality opinion, concurred in by only four members of the Court.[7] Three members of the Court vigorously dissented. Two concurred only in the judgment. Concurring in the judgment, Justice Powell remarked on the fact that views expressed in the dissent came from the Court "late in the Term" and expressed the hope that, "[s]ome future case affording an opportunity for more thorough consideration of the basic principles at risk may offer some better, if more radical, solution to the confusion that infects this benighted area of the law." —— U.S. at ——, 101 S.Ct. at 2851.[8] Perhaps this may be such a case.

In *Robbins* the Court held that a small (about the size of a cigar box), closed, opaque container discovered when the officers "opened the tailgate of the

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[7] *See generally*, Note, "Plurality Decisions and Judicial Decisionmaking," 94 Harv. L. Rev. 1127 (1981).

[8] *See* Hutchison, "Felix Frankfurter and the Business of the Supreme Court, O.T. 1946, O.T. 1961," 1980 S.Ct. Rev. 143, 185-89 (1981).

stationwagon, located a handle set flush in the deck, and lifted it up to uncover a recessed luggage compartment," *id.* at ——, 101 S.Ct. at 2844, could not be opened without a warrant. The Court, creating a "bright line" rule, decided that a warrant will ordinarily be required before a container found in the trunk of a car may be searched. It noted two exceptions to this: No warrant is required for (1) a container which, by its very nature, reveals its contents, or (2) a container, the contents of which are exposed to "plain view." *Id.* at ——, 101 S.Ct. at 2846 (relying on *Sanders*, 442 U.S. at 764 n.13, 99 S.Ct. at 2593-94). Justice Stewart noted that the first was merely a variation of the second, "since, if the distinctive configuration of a container proclaims its contents, the contents cannot fairly be said to have been removed from a searching officer's view. The same would be true, of course, if the container were transparent, or otherwise clearly revealed its contents." *Id.* at ————, 101 S.Ct. at 2846.

Neither *Sanders* nor *Robbins* supports the rule announced by the majority, that "all closed containers manifest an individual's reasonable expectation of privacy in their contents, unless a container *by its very appearance betrays an illegal purpose* or its contents are exposed to plain view." [slip op. at 972 (emphasis added)]. What the Supreme Court stated, contrary to the majority's view, was that it would be easy to identify that "some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy *because their contents can be inferred from their outward appearance*," and that

> not all containers and packages found by police during the course of a search will deserve the

> full protection of the Fourth Amendment . . . . There will be difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. Our decision in this case means only that a warrant generally is required before personal luggage can be searched and that the extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile.

442 U.S. at 764 n.13, 99 S.Ct. at 2593-94 n.13 (emphasis added).

If *Sanders* can be construed as holding that a container is protected only if it is "inevitably associated with the expectation of privacy," 442 U.S. at 762, 99 S.Ct. at 2592.[9] *Robbins* indicates that containers are protected unless they are inevitably not associated with an expectation of privacy. These are but alternate statements of what in effect is the same principle. Under either *Sanders* or *Robbins* Savage cannot reasonably claim to have a Fourth Amendment privacy interest in the bales of marijuana. If, as the majority notes, the bales could just as easily have contained "tobacco, cotton goods, and hemp" then it is clear that the forty-three bales—by both their nature and their number—betrayed that they did not contain personal items, but must have contained some agricultural commodity. I do not believe that even if Agent Cooke had not smelled marijuana that the bales would have been protected under a privacy theory. If, as the majority assures us these bales could have contained one of several agricultural products, I do

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[9] *See United States* v. *Goshorn*, 628 F.2d 697, 700-01 (1st Cir. 1980); *United States* v. *Mannino*, 635 F.2d 110, 114 (2d Cir. 1980).

not think that, before the public could search them, they would have to eliminate every possible commodity except marijuana—no more than they would have to know whether a gun case contained a Remington, a Winchester, or a sawed-off, home-made shotgun. Nor is it of any account to argue that the bales *might* have contained personal items, since someone might just as easily place socks, underwear, and a toothbrush in a gun case or in a burglar's kit.

Thus the marijuana in this case was, I submit, in "plain view" or "otherwise clearly revealed." One controlling fact here is that the odor of the marijuana —over 2,600 pounds—was distinctive and clearly observable. That was sufficient to place the contents of the bales in "plain view." We held in *United States* v. *Haynie*, 637 F.2d 227, 233 (4th Cir. 1980), that "probable cause may be supported by the detection of distinctive odors as well as sight." In *United States* v. *Sifuentes*, 504 F.2d 845, 848 (4th Cir. 1974), we found that "[w]hen the police opened the door of the van, they saw the boxes and smelled a strong odor of marijuana. These facts combined to place the contraband in plain view, that is, obvious to the senses." It should be clear that the odor of marijuana provides sufficient grounds for probable cause. *See* Annotation, "Odor of Narcotics as Providing Probable Cause for Warrantless Search," 5 ALR 4th 681, 687-98 (1981) (collecting cases).

For these reasons I do not regard *Robbins* as analogous to this case. It is true that both cases are similar in that there was probable cause to search the interior of the stationwagon in *Robbins* and the truck in this case, but in this case, the bales of marijuana—forty-three of them weighing some sixty pounds each—were all stacked up in the truck, open to plain view and disclosing their character by their distinctive odor.

The Court in *Robbins* was dealing with two packages brick-like in size, inside a closed opaque container, and stored in a closed luggage compartment. Moreover, there was no contention that the two bricks, stored in a container located in a recessed luggage compartment, were distinguished by odor; in this case, the evidence was ample that there was such odor. And this difference is understandable. There were at most some twenty or thirty pounds of marijuana in *Robbins*; there were one hundred times that in this case. I submit these factual differences would be sufficient to justify different results in the two cases.

The plurality opinion in *Robbins* did dismiss the argument that the expectation in privacy of personal effects, which is the basis for the immunity from search, is to be limited to "containers commonly used to transport 'personal effects.' " —— U.S. at ——, 101 S.Ct. at 2845. It reasoned, though, that different people used different containers to carry their "effects" such as "a closed suitcase, briefcase, portfolio, duffle bag, or box." It will be noted, though, that all the illustrations used by the plurality to support this statement relate to containers normally used to carry personal "effects" or "papers." Justice Powell in his concurring opinion draws quite a distinction between containers "such as personal baggage, . . . inevitably associated with the expectation of privacy," and others which "consistently lack such an association." —— U.S. at —— n.3, 101 S.Ct. at 2850 n.3. In dissent, Justice Blackmun perceived the same difficulty in determining what articles, under the plurality's test, could or could not be validly searched without a warrant, as had Justice Powell. He suggested that "only time will tell whether the 'test,' . . . for determining whether a package's exterior 'announce[s] its con-

tents' will lead to a new stream of litigation." *Id.* at ——, 101 S.Ct. at 2851 (citation omitted).

Arkansas v. *Sanders* would confine the rule relied on by the majority to articles which are "inevitably associated with an expectation of privacy." That at least is the way Justice Powell, the author of the opinion in *Sanders*, indicated in his concurring opinion in *Robbins* the opinion in *Sanders* should be construed. Assuredly there was no expectation of privacy in the bulky bales in this case, whether they be regarded as bales of marijuana, or of cotton, or of cloth. Those simply are not articles in which one has some reasonable expectation of privacy. In *Robbins*, Justice Stewart said that "[e]xpectations of privacy are established by social norms, and to fall within the second exception of the footnote in question [footnote 13 in *Sanders*], a container must so clearly announce its contents, whether by its distinctive configuration, its transparency, or otherwise, that its contents are obvious to an observer." —— U.S. ——, 101 S.Ct. at 2847. Applying this to the facts in *Robbins*, he emphasized that there was no proof "that marijuana is ordinarily 'packaged this way.'" The situation here, however, is quite different from that in *Robbins*. While marijuana may not ordinarily be packaged as in *Robbins*, the transportation of marijuana in bales such as was the case here is ordinary, particularly when large quantities of marijuana are involved. "If "social norms" provide the test for determining whether articles found in an automobile enjoy an "expectation of privacy" as "repositories of personal effects," it is plain, I submit, that 2,629 pounds of marijuana, the odor of which is easily detectable, stored in a truck in forty-three bales of sixty pounds each, can hardly be considered by reasonable "social norms" to be the "repositories

of personal effects." There was, in this case, no reasonable "expectation of privacy" in the marijuana and the District Court correctly so ruled.

We may add that there can be no question that Cooke had a right to open the back of the truck. Cooke smelled the marijuana from outside the truck; that gave him probable cause to search the camper. The mobility of the truck gave him the right to search it on the spot. *Chambers* v. *Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970); *Carroll* v. *United States*, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.2d 543 (1925). The response adopted by Agent Cooke and Patrolman Thrasher was surely reasonable. Given that the odor of marijuana gave them probable cause to search the truck, they did not have to simply shrug their shoulders and allow Savage and Sharpe to escape, *Adams* v. *Williams*, 407 U.S. 143, 145, 92 S.Ct. 1921, 1922, 32 L.Ed.2d 612 (1972), while they went off in pursuit of a warrant. And to have detained Savage and Sharpe until a warrant was secured would only have compounded the "error" (of delay) of which the majority complains.

The fact that the bales were not opened until two or three days after they were seized is not constitutionally significant. The bales did not lose the property of "plain smell—plain view" by being transported to Charleston. The odor from the bales was just as obvious in Charleston as it was along the side of the highway. The Supreme Court stated in *Chambers* v. *Maroney*, 399 U.S. at 52, 90 S.Ct. at 1981: "For constitutional purposes, we see no differences between, on the one hand, seizing and holding a car before presenting the probable cause issue to a magistrate and, on the other hand, carrying out an immediate search without a warrant. Given probable cause to search, either course is reasonable under

the Fourth Amendment." This view from *Chambers* has been followed in other cases involving automobiles, *Cardwell* v. *Lewis*, 417 U.S. 583, 595-96, 94 S.Ct. 2464, 2471-72, 41 L.Ed.2d 325 (1974) (plurality opinion); *Colorado* v. *Bannister*, —— U.S. ——, ——, 101 S.Ct. 42, 43, 66 L.Ed.2d 1 (1980); *Cooper* v. *California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967);[10] *Texas* v. *White*, 423 U.S. 67, 68, 96 S.Ct. 304, 305, 46 L.Ed2d 209 (1976) (per curiam),

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[10] *Cooper* is an interesting case in point. The police impounded the defendant's car at the same time that they arrested him but did not search the car until a week later. Evidence seized during the search was introduced against him. Later cases have tried to distinguish *Cooper* on the grounds that a California statute authorized seizure of the car pending forfeiture proceedings, *e.g.*, *Coolidge* v. *New Hampshire*, 403 U.S. 443, 457 n.12, 91 S.Ct. 2022, 2033 n.12, 29 L.Ed.2d 564 (1971); *see* Note, "Warrantless Searches and Seizures of Automobiles," 87 Harv. L. Rev. 835, 846-47 (1974), but the language of *Cooper* indicates that the Court did not rely exclusively on that ground:

> But the question here is not whether the search was authorized by state law. The question is rather whether the search was reasonable under the Fourth Amendment. Just as a search authorized by state law may be an unreasonable one under that amendment, so may a search not expressly authorized by state law be justified as a constitutionally reasonable one. While it is true, as the lower court said that 'lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it,' [234 Cal. App. 2d 587, 598, 44 Cal. Rptr. 483, 491], the reason for and nature of the custody may constitutionally justify the search.

386 U.S. at 61, 87 S.Ct. at 790-91.

The Court then distinguished *Cooper* from *Preston* v. *United States*, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964), because the police in *Preston* searched Preston's car after he had been picked up for vagrancy; the search was not incident to the arrest.

and in at least one case involving the defendant's personal effects. In *United States* v. *Edwards*, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974), the Court held that no search warrant was required to take the suspect's clothing from him ten hours after he had been arrested:

> Surely, the clothes could have been brushed down and vacuumed while Edwards had them on in the cell, and it was similarly reasonable to take and examine them as the police did, particularly in view of the existence of probable cause linking the clothes to the crime. Indeed it is difficult to perceive what is unreasonable about the police's examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest.

415 U.S. at 806, 94 S.Ct. at 1238. The Court concluded by quoting *United States* v. *DeLeo*, 422 F.2d 487, 493 (1st Cir.), *cert. denied*, 397 U.S. 1037, 90 S.Ct. 1355, 25 L.Ed.2d 648 (1970) (footnote omitted): " 'While the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence,' " 415 U.S. at 808-09, 94 S.Ct. at 1239-40. *See Abel* v. *United States*, 362 U.S. 217, 239, 80 S.Ct. 683, 697, 4 L.Ed.2d 668 (1960).

I am not suggesting that the search of the bales in Charleston is justified under the automobile exception. The *Carroll* exception is applicable to this case only in that the mobility of the truck and the odor of the marijuana combined to give Agent Cooke probable cause and the exigent circumstances necessary to

search for the marijuana he smelled without first securing a warrant. Agent Cooke had a right to open the back of the truck which then exposed the bales. I am suggesting that seeing the bales and smelling the odor of marijuana placed the marijuana in plain view and made obtaining a warrant to search the bales superfluous.[11] "It is no answer to say that the police could have obtained a warrant, for '[t]he relevant test is not whether it is reasonable to produce a search warrant, but whether the search was reasonable.'" *Cooper* v. *California*, 386 U.S. 58, 62, 87 S.Ct. 788, 791, 17 L.Ed.2d 730 (1967) (quoting *United States* v. *Rabinowitz*, 339 U.S. 56, 66, 70 S.Ct. 430, 435, 94 L.Ed.2d 653 (1950). Having smelled the marijuana, having seen the forty-three bales, and then arresting Savage for possession of marijuana with intent to distribute and Sharpe for conspiracy to possess marijuana with intent to distribute, it would have been a gratuitous formality for Cooke to have requested a warrant.[12]

After *Arkansas* v. *Sanders* the courts may have been confused over which containers were protected

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[11] Allowing the police to search a car without a warrant at the scene but requiring them to obtain a warrant before searching it at the station would ultimately encourage police to search the vehicle before making the arrest. Note, "Warrantless Searches and Seizures of Automobiles," 87 Harv. L. Rev. 835, 844 (1974).

[12] Since a warrant was secured before the Pontiac was searched, it is obvious that Cooke was not ignorant of the procedure and was not derelict in performing his duty. Although the good faith belief of an officer will not excuse him from getting a warrant, in this case it points to the fact that Cooke believed the marijuana was in plain view. He knew exactly what he had; the only remaining inquiry was a test of the quality of the marijuana.

and which were not, *see United States* v. *Ross*, 655 F.2d 1159, at 1173-1174 n.3 (D.C.Cir. 1981) (en banc) Tamm, J., dissenting), but even after *Robbins* no court need be so confused as to hold that a person has an expectation of privacy in bales of marijuana weighing 2,629 pounds. The "bright line" established by *Robbins* does not apply to this case. Surely we can tell the difference between a suitcase or a green garbage bag and forty-three, sixty-pound burlap bales.

I would sustain the validity of the stop and the search and affirm the judgments of conviction.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

No. 79-5314

UNITED STATES OF AMERICA, APPELLEE

versus

WILLIAM HARRIS SHARPE, APPELLANT

No. 79-5315

UNITED STATES OF AMERICA, APPELLEE

versus

DONALD DAVIS SAVAGE, APPELLANT

Filed Dec. 18, 1981

ORDER

IT IS ORDERED that the order of December 15, 1981 is rescinded,

The appellee's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and in the poll an evenly divided court voted to deny rehearing en banc.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Ervin with the consent of Chief Judge Winter. Judge Russell, Judge Widener, Judge Hall, Judge Sprouse and Judge Chapman would have granted the petition for rehearing en banc.

For the Court,

/s/ William K. Slate, II
WILLIAM K. SLATE, II
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

No. 79-5314

UNITED STATES OF AMERICA, APPELLEE

versus

WILLIAM HARRIS SHARPE, APPELLANT

No. 79-5315

UNITED STATES OF AMERICA, APPELLEE

versus

DONALD DAVIS SAVAGE, APPELLANT

Filed Dec. 15, 1981

ORDER

The appellee's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A majority of the Active Judges did not vote in favor of the suggestion for rehearing en banc,

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Ervin with the consent of Chief Judge Winter. Judge Russell and Judge Hall would have granted the petition for rehearing en banc.

For the Court,

/s/ William K. Slate, II
WILLIAM K. SLATE, II
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH DISTRICT

No. 79-5314

UNITED STATES OF AMERICA, APPELLEE

versus

WILLIAM HARRIS SHARPE, APPELLANT

No. 79-5315

UNITED STATES OF AMERICA, APPELLEE

versus

DONALD DAVIS SAVAGE, APPELLANT

ORDER

The appellee's petition for rehearing and suggestion for rehearing en banc has been submitted to the court. A poll of the court was requested, and in the poll a majority of the judges eligible to vote, including Judge Russell and Judge Hall voted to deny rehearing en banc.

The panel considered the petition for rehearing and is of the opinion that it should be denied.

It is ADJUDGED and ORDERED that the petition for rehearing and suggestion for rehearing en banc are denied.

Entered at the direction of Judge Ervin for a panel consisting of Chief Judge Winter, Judge Russell, and Judge Ervin.

For the Court,

/s/ William K. Slate, II
WILLIAM K. SLATE, II
Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-5315

Cr. 78-138

UNITED STATES OF AMERICA, APPELLEE

vs.

DONALD DAVIS SAVAGE, APPELLANT

Filed Sep. 28, 1981

Appeal from the United States District Court
for the District of South Carolina

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

Filed Sep. 4, 1981

/s/ William K. Slate II
Clerk

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 79-5314

Cr. 78-138

UNITED STATES OF AMERICA, APPELLEE

vs.

WILLIAM HARRIS SHARPE, APPELLANT

Filed Sep. 28, 1981

Appeal from the United States District Court for the District of South Carolina

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of South Carolina, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, reversed.

Filed Sep. 4, 1981

/s/ William K. Slate II
Clerk

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Opposition

81-1736

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FILED
MAY 13 1982
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA,
Petitioner,

V.

WILLIAM HARRIS SHARPE AND
DONALD DAVIS SAVAGE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR SHARPE AND SAVAGE IN OPPOSITION

MARK J. KADISH
RHONDA A. BROFMAN
KADISH, DAVIS & BROFMAN, P.C.
Suite 700, The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 688-2000

QUESTIONS PRESENTED

1. WHETHER THE LENGTH OF THE DETENTIONS OF SHARPE AND SAVAGE EFFECTIVELY TRANSFORMED THEM INTO DE FACTO ARRESTS WITHOUT BASES IN PROBABLE CAUSE, MAKING THEM UNREASONABLE SEIZURES UNDER THE FOURTH AMENDMENT.
2. WHETHER EVIDENCE SEIZED AS A RESULT OF THE UNLAWFUL DETENTIONS SHOULD BE SUPPRESSED.
3. WHETHER POLICE MUST OBTAIN A WARRANT BEFORE ALLOWING A SEARCH AND ANALYSIS OF WELL-PACKAGED BURLAP-WRAPPED BALES WHICH WERE IN A SHELL-CAMPER ATTACHED TO A PICKUP TRUCK.

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IN THE

Supreme Court of the United States

October Term, 1981

No. _____

UNITED STATES OF AMERICA,
Petitioner,

V.

WILLIAM HARRIS SHARPE AND
DONALD DAVIS SAVAGE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR SHARPE AND SAVAGE IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1a-38a) is reported at 660 F.2d 967.

JURISDICTION

The judgment of the Court of Appeals was entered on September 4, 1981. A petition for rehearing with a suggestion for rehearing en banc was denied by an equally divided court on December 18, 1981. On February 4, 1982, Justice Brennan extended the time within which to file a petition for a writ of certiorari to and including March 18, 1982. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the District of South Carolina, respondents were convicted of possession of marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). In a 2:1 decision the Court of Appeals reversed respondents' convictions.

1. The evidence showed that on June 9, 1978, DEA Agent Luther Cooke was on patrol in an unmarked car on a coastal road in the vicinity of Sunset Beach, North Carolina, an area under surveillance by law enforcement authorities for suspected drug trafficking. (Tr. 35-36) At approximately 6:30 A.M., Cooke observed a blue pickup truck with an attached camper shell travelling in tandem with a blue Pontiac. Observing that the truck was riding low in the rear and that a quilted material covered the rear window of the camper, Cooke proceeded to follow the vehicles south. (Tr. 39-41) After approximately twenty miles, Cooke determined that he would stop the vehicles and he dispatched a request for aid, to which South Carolina Highway Patrolman Thrasher responded. (Tr. 44-47)

Some time after Thrasher joined the procession, the Pontiac and the truck turned onto a loop road through a campground. At no time prior to the turn had the occupants of the truck or vehicle signalled to or communicated with each other, and they did not attempt to do so as they drove the loop road through the campground. Thrasher testified that the truck and Pontiac were travelling between 55 and 60 MPH, although the posted speed was 35 MPH. (Tr. 52) At the end of the loop, the vehicles turned back onto the main coastal highway and again proceeded south toward Myrtle Beach.

Shortly thereafter, Cooke stopped the Pontiac and Thrasher stopped the truck. Cooke approached the Pontiac's occupants and identified himself. He requested and received an operator's license from the driver, Sharpe; the license was in the name of Raymond J. Pavlovich. (Tr. 54) Sharpe and his passenger Davis (the charges against whom were later dropped) were not told why they had been stopped. Several minutes later, Cooke radioed the local police for assistance, and two officers from the Myrtle Beach Police Department eventually arrived, in uniform and armed. (Tr. 54-57, 100-101) Asking the local police to "maintain the situation," Cooke turned custody of Sharpe and Davis over to them and left to join Thrasher, who was with the truck a few blocks further south.

After stopping the truck, Thrasher had approached it with his revolver drawn, had ordered the driver to get out of the truck and to assume a spread-eagled position against its side, and had searched him. At Thrasher's request, the driver had produced a Florida license identifying him as William Savage and a bill of sale for the truck in the name of Pavlovich. Thrasher gave Savage no reason for the stop but indicated that he would hold him there until Cooke arrived. Savage had then requested the return of his license and permission to leave. Thrasher had refused to return the license and told Savage that he was not free to leave, as he was under custodial arrest, and that he could detain Savage on speeding charges if necessary. (Tr. 146-150, 163-165)

When Cooke arrived approximately fifteen minutes after the truck had been stopped, he identified himself as a DEA agent, and Thrasher handed him Savage's license and the bill of sale. Cooke twice requested that he be

allowed to search the camper and was refused both times. Cooke then stepped onto the rear bumper and observed that it did not lower appreciably. He leaned against the rear of the camper, breathed deeply, and announced that he detected the smell of marijuana. Cooke removed the keys from the ignition, unlocked the camper and searched it, finding a number of highly compressed, well-wrapped burlap bales but no marijuana residue.

After the search of the camper, Cooke placed Savage under arrest and left him in Thrasher's custody while he returned to the Pontiac, where he placed Sharpe under arrest. By the time Sharpe was arrested, approximately thirty to forty minutes had elapsed since Cooke had first stopped the Pontiac.

Cooke then assembled the various parties and vehicles and led them to the Myrtle Beach police station. That evening the truck was driven to the Federal Building in Charleston, and two or three days later, Cooke supervised the unloading of the truck, which contained forty-three intact bales. Eight randomly selected bales were then searched, and analysis of samples taken from them revealed that the bales contained marijuana. No search warrant was obtained prior to the unloading and analyzing of the bales and their contents. Cooke retained two of the eight bales and stored them in a vault in his office; the rest were destroyed by fire, under the direction of the Assistant United States Attorney and without permission of the district court. (Tr. 221-222, 151-154)

ARGUMENT

1. Petitioner has misstated the holding of the court below. Petitioner contends (Pet. 10-17) that the holding [1] was, that absent probable cause, investigatory stops that are more than momentary are per se unreasonable under the Fourth Amendment, without regard to the facts or circumstances that necessitate the detention.

Respondents, however, do not agree that this was the appellate court's holding. Nowhere did the court state that investigatory stops that are more than momentary are per se unreasonable. Certainly the thirty to forty minute "de facto" arrest of Sharpe and the fifteen to twenty minute "de facto" arrest of Savage, both without probable cause, would not lead to the conclusion that this was the court's holding. Instead, the court held that the length of the detentions here effectively transformed them into "traditional" arrests without bases in probable cause, making them unreasonable seizures under the Fourth Amendment.

Nor did the court suggest that the facts or circumstances of the detention should be disregarded. The court below carefully analyzed the facts of the detention. Based on these facts, the court determined that "the lengthy detentions of Sharpe and Savage by law enforcement officers *who had no intention of allowing them to leave custody* closely resembled traditional arrests." (Emphasis added, Pet. App. 7a) It was the court's determination through careful analysis, that the detentions were not investigatory stops but, instead, resembled "de facto" arrests where neither party was free to leave.

---

[1] From the outset, this Court should note that this case was reversed in the Fourth Circuit, on not one, but two, "equally compelling" grounds.

The case *Michigan v. Summers*, No. 79-1794 (June 22, 1981), cited by petitioner is inapposite to the case here. In *Michigan*, officers had a valid warrant issued upon probable cause, to search for contraband in the respondent's home. This Court held that the search warrant implicitly carries with it "the limited authority to detain the occupants of the premises while a proper search is conducted." This holding has no application to the case at bar, because officers here had no warrant to search the vehicle in question. No valid comparison can be made between a case in which a search warrant was issued and one in which no search warrant was issued because the standards and the considerations are different.

Furthermore, petitioner argues that the court's analysis in *Michigan* clearly demonstrates that a law enforcement officer making a valid on-the-street *Terry* stop may also lawfully detain the suspect for more than a brief moment if such action is reasonably required in order to pursue a legitimate avenue of investigation. Respondents, however, have shown that their detention, during which they were not told the reason for the detention and during which Sharpe was detained for thirty-five to forty minutes and Savage for fifteen to twenty minutes, was not reasonable under the circumstances.

Those cases cited in the majority opinion by the court below are more analogous to the facts here. Those cases involve investigatory and custodial detentions where no search warrant exists. *Terry v. Ohio*, 392 U.S. 1 (1968); *Adams v. Williams*, 407 U.S. 143 (1972); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Dunaway v. New York*, 422 U.S. 200 (1979). In fact, the case here, is on all fours with *United States v. Chamberlin*, 644 F.2d 1262 (9th Cir. 1980), *cert. denied*, No. 80-1112 (June 29, 1981)

where the defendant's twenty minute detention was held unreasonable in the absence of probable cause.

Additionally, the petitioner incorrectly states that the delay was attributable to the evasive action taken by respondent Savage. This conclusion has no basis in fact and is contrary to the factual findings of the court below. The lengthy detention was instead due to the officers' conduct: (1) the officers followed respondents for over twenty-one miles before deciding to stop the vehicles; (2) the officers were unsuccessful in making radio communication once the vehicles were stopped; (3) it took the Myrtle Beach police officers over ten minutes to appear on the scene; (4) although *several* officers and agents were surrounding each vehicle, not one officer could tell the drivers why they were being detained; (5) there is nothing in the testimony that shows any "ploy" by Savage to evade officers; (6) the lengthy delay was caused by Agent Cooke's failure to communicate with the several officers assisting him and by all of the officers' failure to follow proper procedure.

Since the court below carefully considered the facts of this case and correctly applied the facts to the current United States Supreme Court law, the petition of the United States should be denied.

2. The court below was correct in its application of the exclusionary rule. Agent Cooke admitted that the stop of Sharpe and Savage was based on the appearance of the pickup truck and was a profile stop. Thrasher testified that he knew in his mind that the truck they were following contained marijuana.

Once the stop was made, Sharpe was not questioned about these suspicions but yet was not free to go on his

way. He was placed in a police car; his license had been seized, and he was detained for approximately forty minutes. The court below correctly determined that this was a custodial arrest without probable cause.

If illegal detention for an extended period of time, without prior probable cause, is not deterred by implementation of the exclusionary rule, then police officers will be judicially licensed to illegally detain suspects, without probable cause for extended periods of time, until the will of the suspect succumbs to the coercive effect of illegal police action. Thus, all fruits of the illegal detention, including the Georgia driver's license in the name of Raymond J. Pavlovich (which is the only evidence which connects Sharpe to the Ford truck), and the marijuana, must be suppressed.

Since Sharpe was illegally arrested, the court below was correct in suppressing all fruits of the illegal arrest. *Brown v. Illinois*, 422 U.S. 590 (1975); *Wong Sun v. United States*, 371 U.S. 471 (1963); *United States v. Chamberlin*, 644 F.2d 1262, *cert. denied*, No. 80-1112 (June 29, 1981).

It is also clear, that prior to the time Savage was put under formal arrest, a "de facto" arrest had occurred. Savage was removed from the car under gunpoint and his person was searched. Subsequently his liberty was restrained for an extended period of time and he was placed under custodial arrest although he was not charged with any offense. All of this occurred *prior to the time* that Cooke purportedly smelled the odor of marijuana from the truck and prior to the search of the truck which resulted in the seizure of marijuana. The discovery of the marijuana was a direct result of the fact that the respondent was placed under a "de facto" arrest, without

probable cause.

Thus, the fruits of the illegal arrest and subsequent search, which include the marijuana, was correctly suppressed. *Brown v. Illinois*, 422 U.S. 590 (1975).

3. In this case, Cooke testified that the bales discovered inside the truck were highly compressed and had an outside wrapper of burlap which was tied with hemp twine. Inside the outer burlap wrapper, there was a white plastic bag which was taped closed and inside that were two Kraft paper bags wrapped around a tube of marijuana. Cooke acknowledged in his testimony that the marijuana was extremely well-packaged. Additionally, these well-packaged bales were located in the camper, which is the equivalent of a luggage compartment and were closed containers, since their appearance did not manifest their contents. As the court below noted, Sharpe and Savage produced ample evidence of the virtual identity in appearance of the marijuana bales and bales of tobacco, cotton goods and hemp. (Pet. App. 12a, n. 4) Furthermore, there was nothing in the record which showed that any of the marijuana or its residue was in plain view.

Thus, the court below correctly held that the officers should have obtained a search warrant before allowing the search and analysis of the well-packaged bales of marijuana to proceed two or three days after the stops and detentions. Authority for this conclusion is found in *Robbins v. California*, No. 80-148 (July 1, 1981).

> Applying *Robbins*, the Fourth Circuit Court found: The well packaged bales were located in the equivalent of a luggage compartment and were closed containers within the meaning of the plurality opinion, and, as their appearance did not manifest their

> contents, the warrantless search was unconstitutional . . . Sharpe and Savage, moreover, had a reasonable expectation of privacy in the bales, as evidenced by the careful packaging and sealing of the bales and the placing of them inside the curtained camper.
>
> Cook therefore should have obtained a warrant prior to searching the bales. Because he did not do so, the marijuana should have been suppressed on this ground, as well as on the ground that the initial seizure of the bales was unlawful. (Pet. App. 11a-12a)

Petitioner argues that if this Court reverses the case *United States v. Ross*, No. 80-2209, argued March 1, 1982, then the holding of the Fourth Circuit on the warrantless search issue must be rejected. However, respondents contend that the unsealed paper bag in *Ross* which could not be expected to remain closed or intact, cannot be compared to the well-packaged containers involved in this case.

Finally, petitioner argues that since the odor of marijuana emanating from the bales exposed their contents to "plain smell", no warrant was necessary to inspect the contents of the bales. However, as stated in *United States v. Dien*, 609 F.2d 1038 (2nd Cir. 1979):

> By placing the marijuana inside a plain cardboard box, sealing it with tape and placing it inside a van the windows of which had been painted over and in which plywood had been placed behind the driver's seat, petitioners manifested an expectation that the contents would remain free from public examination. The fact that the agents detected the odor of marijuana emanating from the van did not alter this. (at 1045)

Also see *Arkansas v. Sanders*, 442 U.S. 753 (1979).

CONCLUSION

It should be noted that other meritorious issues were raised but not reached by the Fourth Circuit because respondents' convictions already had been reversed on two grounds. These additional issues include: (1) whether the facts known to the police authorities at the time they stopped respondents were tenuous and did not provide sufficiently articulable suspicion to justify a limited stop; and (2) whether the court erred when it denied respondents' motion to dismiss the indictment and the destruction of marijuana by the DEA, in the absence of notification to defense counsel, and in the absence of a court order. As to the second issue, the court went so far as to say:

> Another ground upon which Sharpe and Savage challenge the admission of the marijuana into evidence was the prejudicial effect of the destruction of the marijuana. Because we conclude that the marijuana should have been suppressed, we do not find it necessary to decide this question. The procedure that the government followed in destroying the evidence —without defense counsel's knowledge and without leave from the district court—nevertheless seriously concerns us. . . .
>
> (Pet. App. 12a, n. 5)

Thus, even if this Court granted certiorari on one issue, and ruled in favor of petitioner on that issue, it would not be dispositive of the outcome of the case, since it was reversed on more than one ground and since several issues were not reached.

For all the above and foregoing reasons the petition for certiorari should be denied.

Respectfully submitted,

KADISH, DAVIS & BROFMAN, P.C.
By:

/S/ MARK J. KADISH
MARK J. KADISH

/S/ RHONDA A. BROFMAN
RHONDA A. BROFMAN
Attorneys for Sharpe and Savage

Suite 700, The Grant Building
44 Broad Street, N.W.
Atlanta, Georgia 30303
(404) 688-2000

CERTIFICATE OF SERVICE

I hereby certify that I have this date served opposing counsel, Mr. Rex E. Lee, Solicitor General, D. Lowell Jensen, Assistant Attorney General, Elliott Schulder, Assistant to the Solicitor General, and John F. Depue, Attorney, Department of Justice, Washington, D.C. 20530, with a copy of the within and foregoing Brief for Sharpe and Savage in Opposition, by depositing same in the United States Mail in properly addressed envelopes with adequate postage affixed thereon to insure delivery.

This the 10th day of May, 1982.

MARK J. KADISH
Attorney for Respondents,
Sharpe and Savage

Petitioner's Reply Brief

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No. 81-1736

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM HARRIS SHARPE AND
DONALD DAVIS SAVAGE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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1. a. Respondents contend (Br. in Opp. 5) that our petition for certiorari misstates the holding of the court below. They assert that the majority did not hold that, absent probable cause, investigatory stops that are more than momentary are per se unreasonable; rather, in respondents' view, the court's decision is based upon the totality of the circumstances, including the length of the detentions.

The majority opinion, however, can be read only as adopting the inflexible position that an otherwise valid *Terry* stop cannot survive Fourth Amendment scrutiny unless it "meet[s] the requirement of brevity" (Pet.

App. 6a). The majority declared that "it is the transitory nature of the stop that justifies the elimination of the probable cause requirement" (*id.* at 6a). Having found that "[t]he stops and detention in this case cannot be described as brief" (*id.* at 7a), the majority concluded—*without* consideration of the circumstances that resulted in the more than momentary detention of respondents—that "the length of the detentions effectively transformed them into de facto arrests * * *" (*ibid.*). The fact that the detentions were prolonged beyond a brief moment was thus the dispositive factor supporting the majority's determination that they constituted unlawful arrests.

b. Respondents observe (Br. in Opp. 5) that, in finding that their detentions constituted arrests requiring probable cause, the majority below noted that the law enforcement officers who apprehended them "had no intention of allowing them to leave * * *" (Pet. App. 7a). However, an investigative stop regulated by the Fourth Amendment by definition involves the suspect's involuntary detention by police. In *Terry* v. *Ohio*, 392 U.S. 1 (1968), the Court recognized the principle that certain police conduct may constitute a "seizure" under the Fourth Amendment yet not require probable cause. The Court left no doubt that such a "seizure" involves some restraint on the freedom of the individual to walk away. *Id.* at 16. Indeed, as Justice Stewart explained in *United States* v. *Mendenhall*, 446 U.S. 544, 552-555 (1980), when an individual is free to leave an encounter with a police officer, that encounter is not a "seizure" that implicates the protections of the Fourth Amendment at all.[1]

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[1] We adhere to the view that a person is "seized" only when, by means of physical force or a show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards. The purpose of the Fourth Amendment is not to eliminate all contact between the police and the citizenry, but "to prevent arbitrary and oppressive interference by en-

Thus, contrary to respondents' suggestion, the fact that an individual's freedom to leave during an investigative detention of limited duration may be restrained in the same manner as it would be if he were arrested does not imply that the detention requires probable cause. In contrast to a seizure that may be justified by less than probable cause, an arrest "is inevitably accompanied by future interference with the individual's freedom of movement." *Terry* v. *Ohio*, *supra*, 392 U.S. at 26. As one leading authority has stated:

> The typical stopping for investigation cannot be viewed as anything but a complete restriction on liberty of movement for a time, and if investigation uncovers added facts bringing about an arrest, the early stages of the arrest will not involve any new restraint of significance * * *. A stopping for investigation is not a lesser intrusion, as compared to arrest, because the restriction on movement is incomplete, but rather because it is brief when compared with arrest, which (as emphasized in *Terry*) "is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows."

3 W. LaFave, *Search and Seizure* § 9.2, at 29-30 (1978).

In short, the fact that respondents' detention was involuntary did not transform the stops into arrests. Furthermore, because involuntariness is inherent in the concept of a forcible investigatory stop that is subject to the Fourth Amendment, the detainee's inability to leave

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forcement officials with the privacy and personal security of individuals." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 554. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification.

United States v. *Mendenhall*, *supra*, 446 U.S. at 553-554 (opinion of Stewart, J.).

cannot possibly be a factor to be taken into account in determining whether the detention amounted to an unlawful arrest.

c. Respondents argue (Br. in Opp. 6) that we have improperly relied upon *Michigan* v. *Summers*, 452 U.S. 692 (1981), to support our contention that law enforcement officers may detain a suspect for more than a brief moment where such action is required to pursue a legitimate avenue of investigation. In contrast to this case, respondents argue, the police in *Summers* had a warrant to search the defendant's home, and the detention of the defendant was thus an incident of the execution of that warrant. We acknowledged this distinction in our petition (at 12), and we adhere to the view that the decision below is inconsistent with this Court's analysis in *Summers*.

Although the Court in *Summers* viewed the existence of a warrant as "[o]f prime importance in assessing the intrusion" (452 U.S. at 701) in the particular circumstances of that case, the Court nevertheless emphasized that "[t]he fact that our holding today deals with a case in which the police had a warrant does not, of course, preclude the possibility that comparable police conduct may be justified by exigent circumstances in the absence of a warrant." *Id.* at 702 n.17. The Court in *Summers* cited with approval Justice White's observation in his concurrence in *Dunaway* v. *New York*, 442 U.S. 200, 219 (1979), that, under some circumstances, the police must be able to detain a suspect for longer than the brief period involved in *Terry* and *Adams* v. *Williams*, 407 U.S. 143 (1972), in order to investigate criminal activity. 452 U.S. at 700 n.12. In addition, the Court quoted Professor LaFave's recitation of investigative techniques that would be likely to require a more than momentary seizure of a suspect, such as " 'interrogation, which may include both a request for identification and inquiry concerning the suspicious conduct of the person detained' " and detention " 'while it is determined if in fact an

offense has occurred * * *, a process which might involve checking certain premises, locating and examining objects abandoned by the suspect, or talking with other people.'" *Id.* at 700-701 n.12, quoting 3 W. LaFave, *Search and Seizure, supra*, § 9.2, at 36-37. Because the reason for the stop and detention of respondents was precisely for such investigative purposes, this Court's decision in *Summers* has a direct bearing upon the legality of the law enforcement conduct at issue here.

d. Adverting to the difficulties encountered by the officers that contributed to the delay between the initial stops and the formal arrests, respondents argue (Br. in Opp. 7) that we are incorrect in attributing the delay to their evasive actions when directed by Officer Thrasher to stop. As Judge Russell stated in dissent, however, the "ploy by [respondent] Savage in the truck is the basic cause of the delay complained of by [respondents]; there is no evidence of any unnecessary delay on the part of the officers" (Pet. App. 17a). These maneuvers were, alone, responsible for any time lapse resulting from Agent Cooke's efforts to conduct his investigation of both respondents at locations half a mile apart. Thus, contrary to respondents' contention, the length of the detention was not at all the result of the officers' actions. Instead, the officers' actions, including Agent Cooke's attempts to contact Officer Thrasher by radio and his awaiting the arrival of local police to maintain the status quo at the site of the first stop, were directly attributable to the fact that respondents were stopped at separate locations. Although the majority below found that the overall delay transformed the stops into unlawful arrests, it never even suggested that these actions or any of the other factors enumerated by respondents constituted unreasonable conduct.[2]

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[2] The other factors cited by respondents, Agent Cooke's 21 mile surveillance of their vehicles before stopping them and the alleged failure of the police to explain the reason for the stop, did not in any way contribute to extending the detention of respondents. The

2. Respondents also contend (Br. in Opp. 8-9) that the marijuana bales discovered in Savage's truck as well as Sharpe's driver's license, issued to Raymond J. Pavlovich, were the tainted fruits of their unlawfully prolonged detentions. Assuming, arguendo, that the duration of the stops transformed them into unlawful arrests, this argument fails to distinguish between the products of the lawful initial stops and the evidence, if any, that resulted from the prolongation of respondents' detentions. In other words, respondents have utterly failed to establish a legitimate causal nexus between the extended nature of their detentions and the seizure of the driver's license from Sharpe, on the one hand, and discovery of the marijuana bales in Savage's truck, on the other.

Agent Cooke obtained the "Pavlovich" driver's license immediately after the lawful stop of Sharpe's vehicle (I Tr. 54-55). There is thus no basis whatsoever for the contention that its seizure was the fruit of the ensuing detentions. Moreover, respondents do not explain why "[t]he discovery of the marijuana was a direct result of the fact that the respondent [Savage] was placed under a 'de facto' arrest, without probable cause" (Br. in Opp. 8-9). On the contrary, as we

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lengthy pre-stop surveillance served to assure a sufficient factual predicate for the stops; indeed, Agent Cooke made most of the observations that formed the basis of his suspicion after he had followed respondents' vehicles for some distance (I Tr. 45-50, 85). There is, of course, no constitutional right to be detained at the moment a legally sufficient basis for detention is established. See, *e.g.*, *United States* v. *Davis*, 646 F.2d 1298, 1302 (8th Cir.), cert. denied, No. 81-5011 (Oct. 5, 1981); see also *United States* v. *Lovasco*, 431 U.S. 783, 791 (1977); *United States* v. *Watson*, 423 U.S. 411, 431 (1976) (Powell, J., concurring). Furthermore, while respondents were not expressly informed that they had been stopped because they were suspected of transporting marijuana, this was the only logical implication of Agent Cooke's identification of himself as a DEA agent and his statement to respondent Savage that he believed there was marijuana in Savage's truck (I Tr. 54, 57, 105).

showed in the petition (at 19-20), the discovery of the marijuana in Savage's truck could not meaningfully be said to have resulted from the fact that respondents' detentions were more than momentary. There is, for example, no evidence that the delay between the stops and the discovery enhanced Agent Cooke's ability to smell and accurately identify the odor of marijuana or intensified the odor of the marijuana itself, making it more readily discernible. Furthermore, as we pointed out in the petition (at 20), respondent Sharpe may not challenge the introduction of the marijuana against him at trial, because its discovery in Savage's truck was in no sense a consequence of Sharpe's detention.

3. Respondents' final contention (Br. in Opp. 9-10) is that because the marijuana bales found in Savage's truck were securely wrapped, this case is distinguishable from *United States* v. *Ross*, No. 80-2209 (argued Mar. 1, 1982), which involves the warrantless search by police of an unsealed paper bag found in the trunk of the defendant's automobile. As a result, respondents maintain, this Court's decision in *Ross* will not affect the outcome of this case. We disagree.

In *Ross*, the question presented is whether the warrantless search of the bag found during a lawful automobile search was permissible under the Fourth Amendment. Our argument in support of the legality of the search in *Ross* proceeds on two independent theories. First, we argue that a search warrant is not required to conduct a probable cause search of a container that is not conventionally regarded as embodying a substantial privacy interest. Our second contention in *Ross* is that no warrant is ordinarily required to search a container discovered in the course of a lawful automobile search. Adoption by this Court of either of these arguments in *Ross* will be dispositive of the validity of the marijuana-bale search in this case. Although the bales were securely wrapped and bound, their appearance, as Judge Russell noted in dissent (Pet. App. 30a-31a), made it

obvious that they contained some bulk agricultural commodity, to which an even less substantial privacy interest would attach than to the contents of a closed paper bag. Indeed, the distinctive odor which they emitted made it clear that, in fact, they contained contraband; this odor was analogous to the appearance of the hypothetical gun case or kit of burglar tools referred to in *Arkansas* v. *Sanders*, 442 U.S. 753, 764 n.13 (1979). Moreover, the search of the marijuana bales was an integral part of a lawful search, based upon probable cause, of Savage's truck.[3]

For the foregoing reasons and those presented in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

REX E. LEE
Solicitor General

JUNE 1982

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[3] Respondents' reliance (Br. in Opp. 10) upon *United States* v. *Dien*, 609 F.2d 1038 (1979), adhered to on rehearing, 615 F.2d 10 (2d Cir. 1980), to support their contention that "plain smell," the olfactory equivalent of plain view, does not justify a warrantless search of containers emitting the odor of contraband, is misplaced. In *Dien*, a DEA agent who noticed the odor of marijuana emanating from the inside of a van conducted a warrantless search of the vehicle and discovered partially sealed cardboard cartons inside. One of the cartons, when opened, was found to contain marijuana. 609 F.2d at 1041. The court of appeals held that the opening of the sealed carton was unlawful, reasoning, *inter alia*, that "odors from the van do not reflect upon the contents of cartons in the van since the odors could be emanating from other sources." *Id.* at 1045. Here, by contrast, it was unmistakably clear that the bales in the bed of Savage's truck were the sources of the marijuana odor that Agent Cooke detected emanating from that portion of the vehicle (I Tr. 62-63).

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